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A TREATISE

ON THE

CONSTITUTION AND JURISDICTION

OF

THE COURTS OF THE UNITED STATES,

ON

PLEADING, PRACTICE AND PROCEDURE THEREIN,

AND ON

THE POWERS AND DUTIES OF COMMISSIONERS OF THE CIRCUIT COURTS,

WITH

Forms for said Courts and Commissioners.

BY

GEORGE W. FIELD,

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PREFACE.

THE several courts of the United States are of growing interest and importance to the profession, and the author of this treatise cherishes the hope that it will be found a useful guide to practice in them.

The jurisdiction, pleading and practice of the Court of Claims have heretofore received no special treatment by any author, if we except the valuable monograph of the Hon. William A. Richardson, one of its judges, from which, with his permission, we have freely copied in the notes in treating these subjects.

It is believed that the practitioner will find in this volume all that will be necessary to guide him to practice in this court.

We have also herein considered the powers and duties of commissioners of the circuit courts, and furnished forms for these numerous and important officers and the profession, in proceedings before them.

G. W. FIELD.

JULY, 1883.

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CONTENTS.

CHAPTER I.

PAGE

JUDICIAL POWER OF THE UNITED STATES 1

CHAPTER II.

CONSTITUTION AND ORGANIZATION OF FEDERAL COURTS 10

CHAPTER III.

ORGANIZATION OF DISTRICT COURTS 20

CHAPTER IV.

TERMS AND SESSIONS OF THE DISTRICT COURTS 37

CHAPTER V.

JURISDICTION OF THE DISTRICT COURTS 54

CHAPTER VI.

PLEADING AND PRACTICE IN ADMIRALTY IN THE DISTRICT COURTS . . . 70

CHAPTER VII.

JUDICIAL CIRCUITS AND ORGANIZATION OF THE CIRCUIT COURTS . . . 101

CHAPTER VIII.

JURISDICTION OF THE CIRCUIT COURTS 108

CHAPTER IX.

PRACTICE AND PROCEDURE IN SUITS AT LAW IN THE CIRCUIT COURTS . . 175

CHAPTER X.

PRACTICE AND PROCEDURE IN EQUITY IN THE CIRCUIT COURTS . . . 184

CHAPTER XI.

SUPREME COURT, ORGANIZATION AND SESSIONS 222

CHAPTER XII.

ORIGINAL JURISDICTION OF THE SUPREME COURT AT LAW AND IN EQUITY . 227

CHAPTER XIII.

JURISDICTION ON WRITS OF ERROR AND APPEAL 239

CHAPTER XIV.

PRACTICE AND PROCEDURE ON WRITS OF ERROR AND APPEAL 272

CHAPTER XV.

WRITS OF PROHIBITION 293

CHAPTER XVI.

PAGE
WRITS OF MANDAMUS 298

CHAPTER XVII.

WRITS OF HABEAS CORPUS 304

CHAPTER XVIII.

COURT OF CLAIMS—JURISDICTION, PLEADING, PRACTICE AND PROCEDURE . . 314

CHAPTER XIX.

COMMISSIONERS OF THE CIRCUIT COURTS 385

CHAPTER XX.

PROCEDURE IN CRIMINAL CASES 415

CHAPTER XXI.

PROVISIONS OF THE REVISED STATUTES COMMON TO MORE THAN ONE COURT . 425

CHAPTER XXII.

PROVISIONS OF THE REVISED STATUTES RELATING TO JURIES, ETC. . . . 448

CHAPTER XXIII.

FEES AND COSTS 456

CHAPTER XXIV.

PROVISIONS OF THE REVISED STATUTES RELATING TO EVIDENCE . . . 475

CHAPTER XXV.

PROVISIONS OF THE REVISED STATUTES REGULATING PROCEDURE . . . 504

CHAPTER XXVI.

PROVISIONS OF THE REVISED STATUTES ON LIMITATIONS 526

RULES.

GENERAL RULES OF THE SUPREME COURT 529
RULES IN EQUITY 546
RULES IN ADMIRALTY 575
RULES FOR THE COURT OF CLAIMS 593

CLASSIFICATION OF FORMS.

FORMS OF CAPTION AND TITLE OF CAUSES IN SUITS AT LAW AND IN EQUITY 611
FORMS IN SUITS AT LAW 613
FORMS IN EQUITY 625
FORMS IN ADMIRALTY 704
FORMS FOR THE REMOVAL OF CAUSES 764
FORMS IN CRIMINAL CASES 775
FORMS IN PROCEEDINGS BEFORE COMMISSIONERS 785
FORMS FOR THE SUPREME COURT 801
FORMS FOR THE COURT OF CLAIMS 845

TABLE OF CASES.

	PAGE
Abby, The	82
Ableman *v.* Booth	55, 149
About 18,000 Gals. Dist. Spir.	83
Abraucher *v.* Schell	156
Adaline, The	70
Adams *v.* Board of Com.	112
v. Jones	171
v. Law	428
v. Lesher	494
v. Woods	528
v. Wray	494
Ægo, The	203
Akerly *v.* Vilas	167
Aldrich *v.* Etna Ins. Co.	269
Alecta, The	295
Alice Tainer, The	178, 186
Alicia, The	7, 246
Alire *v.*.United States	341
Allen *v.* Allen	215
v. Blunt	140, 182, 478
v. Massey	431
v. McKay	93
v. Newberry	67
v. Robinson	110, 148
v. Thaxter	494
v. United States	345
Almeida, The	66
Alston *v.* Manning	449
Amelia, The	64
American Ins. Co. *v.* Canton	449
Ames *v.* Smith	182
Amiable Nancy, The	80
Amory *v.* Amory	157, 497
Andrews *v.* Wall	60
Anna, The	35, 466
Anne, The	66
Appling *v.* Bailey	300
Arapahoe Co. *v.* Kan. Pac. R. Co.	116, 157
Arcy *v.* Ketchum	499
Arlington *v.* Van Huton	300
Armstrong's Foundry	81, 139
Armstrong *v.* Brown	481
v. Carson	500
v. Treasurer	266
Arndt *v.* Arndt	499
Arthurs *v.* Hart	244
Atherton *v.* Fowler	268
Atkyns *v.* Burrows	58
Atlantic and Ogdensburgh, The	68
Atlee *v.* Potier	155

	PAGE
Atocha *v.* United States	344
Ault *v.* Zehering	494
Aurora, The	60, 62
Austin *v.* Miller	432
Avery, The	27, 90
Ayers *v.* Carver	248
Bacon *v.* Howard	498
Bagley *v.* Yates	435
Bagnel *v.* Broderick	270
Baker *v.* Peterson	155
Ballenger *v.* Mackay	213
Bangel *v.* Brodrich	270
Bank *v.* Dalton	498
v. Deveaux	135, 136
v. Green	172
v. Halstead	183, 427, 429
v. Hoof	245
v. Labilut	180
v. McVeigh	265
v. Wheeler	497
of Bethel *v.* Pahquioque	143
of Kentucky *v.* Wister	230
of United States *v.* Daniel	242
v. Deveaux	136
v. Moss	112
v. Planters' Bank	230
v. Ritchie	220
v. Smith	286
v. Swan	277
v. White	111, 184, 186, 199, 221, 238
of West Tennessee *v.* Citizens' Bank	266
Baker *v.* Jackson	431
Banks *v.* Carrolton R.	205
Barber *v.* Barber	111
v. Root	500
Barlow *v.* Steel	496
Barnard *v.* Fowler	497
Barnes *v.* United States	476
v. Williams	260, 286
Barnet *v.* Day	407, 478
Barney *v.* Baltimore City	116, 132, 205, 208
v. Globe Bank	110, 133
Barns, In re	305
Barrett *v.* Failing	497
Barron *v.* City of Baltimore	125, 264
Barrow *v.* Hunton	149

	PAGE
Barrow *v.* Steele	495
Barry *v.* Mercein	113, 243
Bartemeyer *v.* Iowa	264
Barth *v.* McKeever	121, 183
Bartlett *v.* Crittenden	141
Bas *v.* Steele	434
Bassett *v.* United States	170
Bates *v.* Lyon	500
Batesville Inst. *v.* Kauffman	132
Bath County *v.* Amy	175, 301
Battin *v.* Tagget	142, 426
Batting, Ex parte	299
Bayden *v.* Burke	489
Bayerque *v.* Cohen	235
Beale *v.* Berryman	500
Beardsley *v.* Little	180
Bechtel *v.* United States	487
Beckwith *v.* Easton	458
Beebe *v.* Russell	247, 248
Beebes, Ex parte	435, 481
Beecher *v.* Gillett	110, 148
Beers *v.* Haughton	70, 96, 180, 427
Belfast, The	58, 59, 66
Bell *v.* Davidson	214
v. Morrison	405, 406, 431
Bellows *v.* Bank	286
Belton *v.* Fisher	496
Benchley *v.* Gilbert	164
Benner *v.* Porter	449
Bennett *v.* Bennett	496
v. Boggs	114
v. Butterworth	112
Bentley *v.* Phelps	220
Bently *v.* Sevier	427
Bernard *v.* Gibson	249, 250
Berry *v.* Mercein	281
Bertonneau *v.* Directors	149
Bethel *v.* Damaret	268
Bevans *v.* United States	285
Bible Society *v.* Grove	155, 157, 158
Bicknell *v.* Field	497, 498
Biddle, Ex parte	110
Bill *v.* Davidson	480
v. Morrison	403, 478
Bingham *v.* Cabot	117, 137
v. Luddington	441, 442
v. Wilkins	74, 80, 90
Binghamton Bridge	265
Bird of Paradise, The	59
Bishop *v.* United States	349
Bissel *v.* Edwards	495
Bissill *v.* Briggs	499
Blackwell, The	63
Blair *v.* Allen	170
Blanchard *v.* Sprague	142
Blanche Page, The	79
Blease *v.* Garlington	175
Blitz *v.* Columbia Nat. Bank	57, 425
Block *v.* United States	347, 481
Blodget *v.* Jordan	495
Blossom *v.* Railroad Co.	251
Bogert *v.* United States	341, 343, 349
Bollman, Ex parte	125
Bonaparte *v.* Camden & N. R. Co.	124
Bond *v.* Brown	360
v. United States	347
Bonnafee *v.* Williams	119, 120, 121, 136
Bonnafon *v.* United States	345
Bonner *v.* United States	314, 339
Bonyson *v.* Miller	73
Boon *v.* Chiles	194
Borgandus *v.* Trinity Church	238
Boston, The	70, 83
Bottomley *v.* United States	463
Boudereau *v.* Montgomery	481
Bourcicault *v.* Fox	141, 426
v. Hart	141, 426
Bowen *v.* United States	80
Bowie *v.* Talbut	404, 407
Boyce *v.* Grundy	433
v. Tabb	432
Boyd *v.* Alabama	431
Boyle *v.* Zacherie	182, 227, 229, 239
Brackett *v.* The Hercules	65, 91
v. People	496
Bradford *v.* Jenks	135
Bradley *v.* Reed	429
v. Rhines	134
v. United States	340
Bradstreet, Ex parte	244, 300, 301, 304
Bragg *v.* Lorio	27
Branches *v.* Schell,	164
Brashear *v.* West	431
Breadlove *v.* Nicolet	124
Breithaupt *v.* Bank	124
Brig Aldebaran, The	86
Brig Blohm, The	65
Brig Caroline, The	82
Brig Nestor, The	60
Briggs *v.* Johnson Co.	300
v. Campbell	500
Ex parte	298
Bright *v.* White	495
Briscoe *v.* Bank	118, 136
Bristol, The	94
British Prisoners, The	411
Britton *v.* Butler	528
Brobst *v.* Brobst	171
Brockett *v.* Brockett	248
Bronde *v.* Haven	65
Bronson *v.* Keokuk	442
v. Kinzie	189
v. La Cross & M. R. Co.	215
v. Railroad Co.	250
Brooks *v.* Byam	211, 456
v. Hunt	239
v. Norris	251
Broughtour *v.* United States	340, 341
Brown *v.* Aspden	290
v. Atwell,	266

	PAGE
Brown *v.* Brown	119
v. Chesapeake & O. Canal Co.	179
v. Edson	495, 501
v. Johnson	496
v. Keene	117, 137
v. Lull	65
v. Pierce	211
v. Platt	404
v. Pond	176
v. Shannon	142, 158, 245, 426
v. Strode	118
v. Tarkington	481
v. The Independence	490
v. United States	314, 340
v. Union Bank	249, 250
Browne *v.* Browne	119
Bruce *v.* United States	487
Bryan *v.* Bates	267
v. United States	343
Buchanan *v.* Post	500
Buckley *v.* United States	503
Buford *v.* Buford	497
Bullock *v.* Wallingford	489
Burdett *v.* Abbott	309
Burdick *v.* Hale,	155
Burdwick *v.* Hale	16, 156
Burleigh Rock Drill Co. *v.* Lobdel	142
Burlen *v.* Shannon	500
Burnett *v.* Butterworth	285
Burnley *v.* Stevenson	497
Burr *v.* Des Moines Co.	260
v. Durgee	142, 426
v. Gratz	239
v. Gregory	141, 426
Bushnell *v.* Kennedy	133
Bussard *v.* Catabino	405
Butler *v.* Young	175
Butner *v.* Miller	164, 167
Butterfield *v.* Usher	247, 249, 251
Cacullu *v.* Emerling	260
Cadle *v.* Tracy	143
Caldwell *v.* Jackson	274
v. Target	205
Camanche, The	63
Cambuston *v.* United States	248
Cameron *v.* McRoberts	117, 132
Campbell, In re	475
v. Boyreau	169
v. Read	262
v. The Uncle Sam	71
v. United States	341
Canadian Prisoners' case	309
Cannon *v.* New Orleans	266
Canton *v.* American Ins. Co.	259, 457
Caperton *v.* Bowyer	265
Cappell *v.* Hall	82
Carey *v.* Curtis	113
Carleton *v.* Bickford	498
Carlisle *v.* Tuttle	495, 501
Carneal *v.* Banks	132, 204
Carnocan *v.* Christie	215
Caroline, The	78
Carpenter *v.* Providence Ins. Co.	201
v. United States	342
v. Williams	270
Carraher *v.* Brennan	157
Carrington *v.* Bents	191
v. Florida R. Co.	166
v. Pratt	61
v. Stimpson	404, 478
Carter *v.* Bennett	496
Case *v.* McGee	495
Case of Runaways	464
Sewing Machine Co.	114
Cassidy *v.* Leetch	498
Centurion, The	62
Certain Logs of Mahogany	72
Chadwick *v.* United States	485
Chaires *v.* United States	287
Chamberlain *v.* Chandler	69
v. Eckford	135
Chappedelaine *v.* Dechenaux	124
Charles Mears, The	62
Charter Oak *v.* Star Ins. Co.	110, 148
Cheen *v.* Gray	498
Cheever *v.* Wilson	500
Chemung Can. Bank *v.* Lowrey	179
Cherokee Nation *v.* Georgia	230, 235
Cheshire, The	76
Chicago *v.* Sheldon	432
Chiles, In re	436
Chisholm *v.* Georgia	4, 5
Chittenden *v.* Darden	181, 182
Christian *v.* United States	352
Christmas *v.* Russell	117, 120, 137, 498, 499
Christy, In re	295, 296
Church *v.* Crossman	499
v. Hubert	490
v. Stack	300
Chusan, The	59, 61
Circassian, The Steamship	60, 463
City *v.* Lamson	432
City Nat. Bank *v.* Paducah	143
City of Lexington *v.* Butler	133, 136
Norwich, The	94
Phila. *v.* The Collector	164
Washington, The	463
Clare *v.* Nat. Cit. Bank	457
Clark's Ex. *v.* Van Reimsdyk	101
Clark *v.* City of Janesville	135
v. Depew	494, 495
v. Hackett	278
v. Mathews	209
v. Mathewson	120
v. Pratt	500
v. Reyburn	205
v. Smith	110

	PAGE
Clark *v.* White	201
Clearwater *v.* Meredith	131, 440
Clement, The	72
Cleveland, etc., R. Co. *v.* Erie	236
Clicquot's Champagne	503
Clifton *v.* Sheldon	242, 245
v. United States	503
Climents *v.* Moone	204
Clinton *v.* Englebricht	449
Coal Co. *v.* Blatchford	114, 118, 119, 134, 151
Coates *v.* Muse	431
Cochrane *v.* Duner	142
Cockroft *v.* Vose	266, 268
Coddington *v.* Richardson	260, 270
Coffee *v.* Hayward	128
v. Planters' Bank	135
Coffie *v.* Neely	494
Coffin *v.* Jenkins	84
Cohens *v.* Virginia	113, 116, 149, 234, 264, 270, 285
Coiron *v.* Millandon	132, 205, 441
Coleman *v.* Martin	212
v. Waters	495
Collie *v.* United States	428
Collum *v.* Eager	248
Colson *v.* Lewis	123
Colt *v.* Milliken	494
Commercial Bank *v.* Slocumb	114, 135
Commissioners *v.* Aspinwall	302
v. Philadelphia	300
Commonwealth *v.* Denison	298
v. Feely	425
v. Green	496
Bank *v.* Griffith	269
Sav. Bk. *v.* Corbett	156
Condit *v.* Blackwell	501
Cone *v.* Hooper	498
Confiscation Cases, The	27
Connolly *v.* Taylor	117, 121
Connor *v.* Scott	110, 156
v. Peugh	240, 243
Conway, Ex parte	300
Cook *v.* Burnley	240, 405
v. Ford	158
v. Moffatt	113
v. United States	243, 347
Cooke *v.* Woodrow	244
Coons *v.* Gallagher	269
Cooper *v.* Galbreth	115
v. Gordon	131
Copeland *v.* Memphis & Charleston R. Co.	122
Copelin *v.* Ins. Co.	170, 260
Corbet *v.* Gibson	180
v. United States	349
Corbin *v.* Van Buent	152
Corfield *v.* Coryell	496
Cornell *v.* Williams	403
Cornet *v.* Williams	475
Corning *v.* Troy Iron, etc. Fac.	248
Cornwell *v.* White Water, etc. R. Co.	121
Cotton *v.* United States	56
Course *v.* Stedman	244
Cousin *v.* Blanc	266
Covington, etc., Co. *v.* Shepherd	121, 135, 138
Cox *v.* Cox	500
Crafts *v.* Clark	496
Craig *v.* Brown	494, 495, 496
Craighead *v.* Wilson	247
Craigie *v* McArthur	157
Craine *v.* McCoy	433
Crane, Ex parte	300, 301
Crawford *v.* Addison	299
v. Points	247
v. The Wm. Penn	62, 72
v. White	497
Crenshaw, Ex parte	287, 289
Cropper *v.* Coburn	433
Crosby *v.* Buchanan	247
Cross *v.* De Valle	215
Crouch *v.* Collins	293
Crowell *v.* Gallagher	269
v. Hopkinton	485
v. Randall	266
Crussell *v.* United States	348
Cucuta *v.* Emerling	260
Culbertson *v.* Wabash N. Co.	122
Cummings *v.* The Akron C. & P. Co.	47
Cunningham *v.* Olis	481
Curtis *v.* The Cent. R. Co.	480
Cutler *v.* Rae	284
Cutting, Ex parte	247, 250, 299
Dailey *v.* United States	340
Daily *v.* Doe	58
Daniel *v.* Twentyman	124
Daniels *v.* Railroad Co.	253, 254
v. United States	171
Dart *v.* McKinley	155
Davenport *v.* Dows	279, 280
v. Fletcher	257
David Pratt, The	86, 87
Taylor, Ex parte	299
v. Porter	500
Davis, The	63
Ex parte	309
v. Braden	171, 172, 254
v. Child	58, 60
v. Couch	268, 289
v. Grey	114, 116, 489
v. Headley	497
v. Packard	98
v. Smith	497
Davison *v.* Johnson	238
Day *v.* Chism	286
v. Hayward	142

	PAGE
Day *v.* Newark Man. Co.	128, 143, 182
v. Washburn	246
v. Woodward	426
De Arcy *v.* Ketchum	498
De Celis *v.* United States	340, 342
De Groot, Ex parte	299
v. United States	291, 344
De Kraft *v.* Barney	113, 243
De Sobey *v.* Nicholson	237
De Wolf *v.* Rabaud	117
Dean *v.* Chapin	494
v. Mason	259
Dedekam *v.* Vose	456, 457
Deitsch *v.* Wiggins	272, 275
Deneal *v.* Archer	241
Deneale *v.* Stump	257
Denham *v.* Railway Co.	194
Dennis *v.* Eddy	456, 472
v. United States	339
Dennistoun *v.* Stewart	170, 171, 254
v. Draper	110, 148, 167
Derry *v.* Hersey	457
Deshler *v.* Dodge	133, 135
Devereux *v.* Marr	172
Devlin *v.* United States	343
Dexter *v.* Arnold	219
Dickerson *v.* Grissom	501
Diggs *v.* Walcott	430
Dimick *v.* Brooks	501
Dirst *v.* Morris	169, 260
Ditson *v.* Ditson	500
Dixon *v.* Field	300
Dock Bridges, Ex parte	425
Dodge *v.* Israel	214, 215, 481
v. Wolsey	111, 113, 144, 405, 433
Doe *v.* Doe	495
v. Eslava	269
Doherty *v.* United States	340
Doig, In re	310
Dollman *v.* Insurance Co.	267
Donnell *v.* The Starlight	78
Dooley *v.* Smith	269
Doremas *v.* Bennett	114, 440
Dorr, Ex parte	305
Dorsey *v.* Maury	494
Dorsheimer *v.* United States	340
Doswell *v.* De Lanza	239
Doughty *v.* Doughty	500
Douglas *v.* Pike	432
Douro, The	289
Dow *v.* Johnson	255
Dowell *v.* Griswold	149
Downham *v.* Alexandria	266
Draggoo *v.* Graham	494
Drawbridge Co. *v.* Shepherd	494
Dred Scott *v.* Sanford	113, 115, 118, 137, 140
Drew *v.* Judges	300
Dromgoole *v.* Farmers' & M.	134
Drummond *v.* Magruder	501
Dubourg *v.* United States	216
Dugan, Ex parte	278
Dun *v.* Clark	119, 120, 121, 209
Dunbar *v.* Hallowell	498
Duncan *v.* Durst	185
v. Grigan	166
v. United States	178, 186
Duncommon *v.* Hysinger	496
Dunkle *v.* Worcester	407
Dupont *v.* Vance	70
Duponti *v.* Massy	203
Durant *v.* Washington Co.	33
Durousseau *v.* United States	306
Duval *v.* Fearson	500
Duygan *v.* United States	56
Dwight *v.* Humphrey	195
v. Merritt	176, 179, 227
Eads *v.* The H. D. Bacon	63
Eager *v.* Stover	498
Eagle, The	67, 69, 93
Earley *v.* Rogers	239, 240
East Boston Ferry Co. *v.* Boston	300
Eastern Star, The	65
Easton, Ex parte	293, 296, 297
v. Hodges	176, 180
Eaton *v.* Hasty	501
Eberley *v.* Moore	117, 137
Eddy, The	59
Edmonds *v.* Montgomery	498
Edmonson *v.* Bloomshire	275
Edwards *v.* Bond	471
v. Elliott	58, 59, 266
Elastic Fabric Co. *v.* Smith	247
Eleanor Higgins, In re	472
Elly Warley, The	76
Elmondorf *v.* Taylor	431
Ely *v.* Northern P. R. Co.	159
v. Peck	57, 425
Emerson *v.* Davis	220
Emily, The	140
English *v.* Foxall	194
Erb *v.* Scott	496
Estella, The	80
Evans *v.* Eaton	403, 478
v. Gee	135
v. Hettick	478, 481
v. Pack	430
Ewer *v.* Coffin	498
Ewing *v.* Blight	198
Express Co. *v.* Kounts Brothers	137
Fairfield *v.* Gallatin	431
Farey, In re	410
Farlow *v.* Lea	119
Farmers' Co. *v.* Central R. Co.	160
Farrar *v.* United States	123
Featherman *v.* Louisa St. Sem.	180
Fellows *v.* Hall	193, 200
Feltus *v.* Starke	499

	PAGE
Fenemore *v.* United States	428
Ferguson *v.* O'Ilarra	200
Ferrell *v.* Allison	429
Ferrens, In re	305
Feuscher, Ex parte Louis	424
Fidelity, The	75
Field *v.* Holland	101, 216
v. Lownsdale	151, 168
v. Milton	428
v. Saunderson	497
Filor *v.* United States	349
Filpin, Ex parte	299, 302
Findlay *v.* Bank	131
First National Bank of Omaha *v.* County of Douglas	143
First National Bank *v.* Kidd	495
Fish *v.* Union P. R. Co.	159, 167, 168, 429, 430
Fisher *v.* Consequa	177
Fitch *v.* McDiarmid	300
Flanders *v.* Tweed	260
Fleitas *v.* Cockrem	169, 260
Fletcher *v.* Morey	111
v. United States	344
Fleeker *v.* United States	347
Florida *v.* Georgia	227, 228, 235
v. Gibbs	301
Flourenoy *v.* Duke	494
Floyd Acceptances	122
Folger *v.* Insurance Co.	499
Foot *v.* Link	234
Forbes *v.* Parsons	68
Ford *v.* Surget	265
Forgay *v.* Conrad	247, 250, 251
Forsyth *v.* United States	262
Fortitude, The	62
Foster *v.* Glazner	500
v. Goddard	219
Fourth Nat. Bank *v.* Neyhardt	180
Fouvergne *v.* Bryant	148
v. New Orleans	109
Fowle *v.* Alexandria	286
Fowler *v.* Lindsey	230, 428
v. Miller	231
Fox *v.* Ohio	125, 264
Francois Farez, In re	310, 411
Frazier, In re	310
Free Trader, The	463
Freeman *v.* Howe	121
French, Ex parte	302
v. Hay	430
v. Shoemaker	206, 247, 428
Frewall *v.* Bache	481
Friendship, The	64
Fritch *v.* Creighton	110
Fuller *v.* Claflin	247
Fullerton *v.* Bank	179
v. United States	178
Fulson *v.* Marsh	142
Fulton, The	78
Fulton *v.* Gilmore	402
v. McAffee	270
Furman *v.* Nichol	265
Gaines *v.* Chew	196
v. Fuentes	110, 113, 148
v. Relf	111
v. Traverse	74, 79, 186
Gale *v.* Babcock	116
Gallagher *v.* Roberts	238
Galpin *v.* Page	495
Galvin *v.* Bontwell	167
Gammel *v.* Skinner	84, 87
Garden City Man. Co. *v.* Smith	166
Gardner *v.* Isaacson	74
v. Sharp	115
Garland, Ex parte	139, 303
v. Davis	285, 286
Garneau *v.* Dozier	271
Garrett *v.* Woodward	404
Garrison *v.* Memphis Ins. Co.	433
Gass *v.* Stinson	218
Gassies *v.* Ballon	117, 137
Gates *v.* Johnson	70
Gay *v.* Lloyd	494
Gaylords *v.* Kelshaw	235
Gazelle, The	57
Gearing *v.* United States	347
Gelpcke *v.* Dubuque	432
General Smith, The	58, 59, 60
Genesee Chief, The	66, 67, 93
Georgia, The	96
v. Brailsford	230
v. Grant	232
v. Madrazzo	230
v. O'Grady	455
v. Stanton	234, 235
Gerardy *v.* Moore	152
Germain *v.* Mason	241
Gernon *v.* Boecaling	429
Gettings *v.* Crawford	98
Geyger *v.* Geyger	434
Giacomo, In re	411
Gibbons *v.* Ogden	248
v. United States	339, 340
Gibson *v.* Chauteau	265
v. Chew	135
v. Hunter	286
Gibbs *v.* Usher,	110, 148
Giesler, Ex parte	310
Gilman *v.* Gilman	499
v. Illinois, etc., R. Co.	170, 260
v. Lewis	499
Givin *v.* Breedlove	179
Glass *v.* Sloop Betsey	80
Gleason *v.* Florida	264
Glenn *v.* United States	346, 352
Goddard *v.* Ordway	429
Gold W. & W. Co. *v.* Keyes	149
Golden *v.* Prince	431

	PAGE
Goldsmith, The	91
Good *v.* Martin	475
Goodrich, In re	27, 460
v. Chicago	431
Goodwin *v.* Goodwin	494
Goodyear *v.* Bourn	191, 198
v. Day	141
v. Folsom	430
v. Osgood	457
v. Providence Rub. Co.	142, 426
v. Union Rub. Co.	141, 426
Goodyear's Adms. *v.* Toby	198
Gordon, Ex parte	171, 293, 296
v. Caldcleugh	269
v. Hobart	433
v. Longest	112, 157
v. Ogden	242, 244
Gorman *v.* Lenox	240
Governor of Ky. *v.* Gov. of Ohio	303
Grace Gridler, The	100, 245
Gracie *v.* Palmer	122, 128, 177, 191
Graham, Ex parte	296
v. Bayne	260, 286
v. Norton	301
v. Stucken	8, 429
Gran Para, The	89
Grand Chute *v.* Winegar	433
Grand Gulf R. Co. *v.* Marshall	266
Grant *v.* Hamilton	110
v. Henry Clay Coal Co.	494, 501
v. Poillon	58
v. Raymond	253, 254
v. United States	339, 343
Grapeshot, The	62
Gratiot *v.* United States	487
Gray *v.* Blanchard	242
v. Chicago, etc., R. Co.	186
v. Railroad	430
Graydon *v.* Sweet	528
Grayson *v.* Virginia	228, 232
Green *v.* Bishop	219
v. Sarmiento	494, 496, 499
v. Taylor	475
v. United States	113, 475
v. Van Buskirk	428, 499
Gregg *v.* The Clarissa Ann	64
Gregory *v.* McVeigh	266, 267
Grier *v.* Gregg	211
Griffing *v.* Gibb	234
Gruner *v.* United States	246, 251
Guild *v.* Frontin	169, 244
Gupp *v.* Brown	481
Gustine *v.* Ringgold	479
Guttapercha Co. *v.* Goodyear	142
Gwin *v.* Barton	29
v. Breedlove	29
Hackett *v.* Bonnell	496
Hadley *v.* San Francisco	155
Hagan *v.* Walker	131
Haile *v.* Hill	495
Hale *v.* Wash. Ins. Co.	68
Hall *v.* Allen	249, 250
v. Gaines	268
v. Jordan	266, 289
v. Laming	499
v. United States	346
Halstead *v.* Lyon	136
Hamilton Co. *v.* Massachusetts	265
Hammond *v.* The Essex Fire Ins. Co.	65
Hampton *v.* McConnell	500
v. Rouse	240
Hanger *v.* Abbott	146
Hankin *v.* Squires	180
Hanley *v.* Sharp	425
Hannaur *v.* Woodruff	255
Hanrick *v.* Barton	489
Hanson *v.* Fowle	69
Happet and Cargo, The	78
Hardeman *v.* Harris	211
Harding *v.* Handy	132, 217, 218, 234
Harness *v.* Green	496
Harpending *v.* Reformed Dutch Church	494
Harper *v.* The New Brig	91
Harris *v.* Barnett	489
v. Wall	403, 478
Harrison *v.* Hadley	118, 136
v. Harrison	500
v. Nixon	193, 230, 231, 234
v. Rowan	127
Hartshorn *v.* Day	141, 426
v. Wright	112
Hartzel *v.* Tilghman	141, 170, 426
Harvey *v.* Mid. R. Co.	116, 157
v United States	341, 344, 345
Harvey's case	338
Hatch *v.* Chicago, etc., R. Co.	166, 167
v. Dorr	120
v. The Boston	528
Hatcher *v.* Rochelau	496
Hauze *v.* Hauze	495
Havermeyer *v.* Iowa Co.	432
Havre, The	83
Hawthorn *v.* Shepherd	501
Hayford *v.* Griffith	458
Haynes *v.* Cowen	496
Healy *v.* Root	495
Heath *v.* Austin	167, 168
v. Erie R. Co.	199, 237
Heathfield *v.* United States	343
Heavey *v.* Ill. Mid. R. Co.	118
Heinrich, In re	310, 410, 411
Helbron, In re	310
Heminway *v.* Fisher	285
Henderson *v.* Griffin	431
v. Moore	239
v. Steinford	497, 499

	PAGE
Henderson *v.* Tennessee	268
Henderson's Distilled Spirits	82, 170
Hennessy *v.* Sheldon	289
Henry *v.* United States	348
Hensley *v.* Force	500
Hepburn *v.* Ellzey	116
Herman *v.* Herman	210
Herndon *v.* Ridgeway	189
Hewit *v.* Phelps	152
Hibernia, The	463
Higbee *v.* Hopkins	201
Hill *v.* Mendenhall	499, 500
Hine, The	58, 67, 78, 93
Hinley *v.* Rose	289
Hiriat *v.* Ballou	179, 248
Hobart *v.* Drogan	57
Hobson *v.* McArthur	194
Hodge *v.* Williams	257
Hodges *v.* Vaugh	428
Hoffman *v.* Hoffman	500
Hogan *v.* Ross	429
Hoge *v.* Railway Co.	279
v. Williams	257
Holcomb *v.* McKusick	239
Holliday *v.* Boston	257
Hollingsworth *v.* Adams	177
Holmes *v.* Trout	197, 428
Home Ins. Co. *v.* City Council	266
v. Mullen	208
Hood *v.* Hood	500
Hook *v.* Payne	206
Horn *v.* Lockhart	117, 121, 132, 268
Horner *v.* Spilman	295
Hornet, The	83
Hornthall *v.* The Collector	117, 137
Horton *v.* Critchfield	498
Hotel Co. *v.* Wade	119
Hough *v.* Railway	432
Howe *v.* Freeman	182, 183
Howe Machine Co. *v* Edwards	179, 180
Howell *v.* United States	352
Hoxie *v.* Carr	205
Hoyt *v.* Hammakin	481, 487
Hubbard *v.* Northern R. Co.	113, 136
Huber *v.* Reiley	425
Hudnal *v.* United States	347
Hudson *v.* Dailey	500
Huger *v.* South Carolina	228
Hughes *v.* Blake	201
v. Davis	500
v. United States	238
Humiston *v.* Stanthorp	250
Humphreys, Ex parte	408
Hungerford *v.* Sigerson	433
Hunt *v.* Hunt	500
v. Louis	200
Hunter *v.* Marlbro'	220
Huntingdon *v.* Texas	268
Hurst *v.* McNeill	405
v. W. & N. R. Co.	158
Hussey *v.* Bradley	456
Huston *v.* Dunn	499
v. Moore	125
Hutchins *v.* Gerrish	496
Hutchinson *v.* Patrick	501
Hyde *v.* Boorman	260
v. Ruble	152
Iasigi *v.* Brown	434
Illinois, The	186
Inbusch *v.* Farwell	131, 440
India Rubber Co. *v.* Phelps	211
Indianapolis, etc., R. Co. *v.* Horst	180
& St. L. R. Co. *v.* Horst	175
Inerarity *v.* Byrne	273, 428
Ingle *v.* Coolidge	261
v. Jones	214
Insurance Co. *v.* Adams	191
v. Boykin	283
v. Comstock	240, 300
v. Dunham	255
v. Dunn	155, 157, 167
v. Folson	260
v. Francis	138
v. Hendren	267
v. Pechner	156
v. Piaggio	285
v. Ritchie	113, 138
v. Tweed	170, 260
v. United States	139
Irons *v.* Manufacturers' Bank	143, 144
Irvine *v.* Lowry	134
Isabella, The	57
Island City, The	65
Jackson *v.* Ashton	235, 289
v. Rose	57, 425
v. Simonton	29
v. Steamboat Magnolia	92
v. Twentyman	137
Jacques *v.* Collins	433, 434
Jacquette *v.* Hugunon	500
James *v.* Jenkins	177
Jameson *v.* Willis	404
Jansen *v.* The Magdalena	57
Jardine *v.* Richert	498
Jecker *v.* Montgomery	82, 236, 256
Jefferson Bank *v.* Skelly	113
Jenkins *v.* Banning	289
v. Carson	70, 78, 80
v. Eldridge	210, 218, 220
v. United States	348
Jennison *v.* Leonard	170, 260
Jones *v.* Andrews	120, 192
v. Hayes	494
v. League	236
v. McMasters	124
v. Morehead	259
v. Ocean Steam Nav. Co.	160

	PAGE
Jones *v.* Oregon Cent. R. Co.	481
v. Schell	458
v. Spencer	499
v. United States	345
v. Van Zant	253
v. Warner	498
Jerusalem, The	62
Jesse Hoyt, Ex parte	302
Jetter *v.* Hewitt	431
Jewett *v.* Hone	432
John and Alice, The	62
John Griffin, The	503
Johnson *v.* Dobbins	497
v. Donaldson	476
v. Healey	176, 179
v. Jamel	165
v. The Coriolanus	490
v. United States	308, 342
Jordan, Ex parte	246
Jose Ferreirados, In re	411
Joseph Bradley, Ex parte	299
Joseph Stupp, In re	310, 411
Joy *v.* Wirtz	205, 208
Judson, Ex parte	408
In re	405
v. Macon Co.	112
Juneau Bank *v.* McSpedden	129
Kaeiser *v.* Ill. Cent. R. Co.	156
Kain *v.* Texas P. R. Co.	159
Kaine, Ex parte	307, 309, 310
In re	410, 411
Kanouse *v.* Martin	112, 167
Kean *v.* Rice	494
Kearney, Ex parte	306, 308
Keary *v.* Farmers' Bank	134
Keene *v.* Meade	481
v. United States	80
Kellum *v.* Emerson	58
Kelsey *v.* Forsyth	244
v. Pennsylvania R. Co.	122, 137
Kendig *v.* Dean	232, 208, 441
Kennebeck Railroad *v.* Portland Railroad	266
Kennedy *v.* Bank	170, 172, 191, 210, 254
v. Gibson	143
Kentucky *v.* Dennison	7
Kerr *v.* Kerr	498
v. Watts	206
Ketchum *v.* Farmers', etc., Co.	114
Ketland *v.* Bissett	214
Ketridge *v.* Race	211
Key *v.* Vaughn	501
Kidd *v.* Manley	501
Kilburn *v.* State Sav. Inst.	289
Killam *v.* Toms	496
Kimbal *v.* Merrick	499
v. Mobile	431, 433
King *v.* Dale	501
King *v.* United States	458
v. Wilson	112
v. Worthington	157
Kingman *v.* Cowles	494
Kingsbury *v.* Yniestra	498
Kinney, Ex parte	307
Kinnier *v.* Kinnier	500
Kirkman *v.* Hamilton	135
v. Hendrick	498
Kirtland *v.* Hotchkiss	150
Kitchen *v.* Woodfin	466
Klinger *v.* Missouri	266
Knapp *v.* Banks	244
Knode *v.* Williamson	481
Knote *v.* United States	342, 343
Knowles *v.* Gas L. Co.	498
Knox *v.* Summers	191, 234
Kohl *v.* United States	109, 110
Koning *v.* Bayard	178, 183, 186
Kramme *v.* The New England	71
Kuhn *v.* McMillen	498
Kynoch *v.* Ives	64
Lackland *v.* Pritchett	501
Lady Horatio, The	61
Lafayette Ins. Co. *v.* French	499
Lamb *v.* Briard	490
Landsberg, In re	527, 528
Langdon Cheeves, The	64
Lange *v.* Benedict	265
Ex parte	165, 305, 309
Langford *v.* United States	343, 344
L'Arina *v.* Brig Exchange	65
Latham *v.* Almy	426
Latham's Appeal	252, 292
Latimer *v.* Union Pac. R. Co.	499
Latteratt *v.* Cook	494
Lawrence *v.* Jarvis	497, 500
v. Pool	238
Laylor *v.* Kilgore	496
Leavenworth *v.* Barnes	431
Leavy *v.* Seymour	311
Lee, Ex parte	460
v. Hamilton	495
v. Lee	113, 245
v. Rogers	432
v. Watson	112, 242
Leeds *v.* Marine Ins. Co.	201
Legal Tender Cases	269
Legee *v.* Thomas	208
Leiper *v.* Bickley	404
Leland *v.* Wilkinson	171, 254
Lenox *v.* Pront	201
Leon *v.* Galcerean	78
Lessee of Nelson *v.* Moon	192
Lessieur *v.* Price	270
Levy *v.* Burley	490
v. Fitzpatrick	127, 128, 177, 182
Levy Court *v.* Ringgold	34
Lewis *v.* The Elizabeth and Jane	65

	PAGE
Lewis *v.* Wilder	500
Life Ins. Co. *v.* Wilson	299, 301
Life & Fire Ins. Co. *v.* Adams	300
Lilley *v.* United States	344
Lincoln *v.* Tower	498
Lindsey *v.* United States	349
Little *v.* Alison	496
Littlefield *v.* Perry	142
Liverpool Ins. Co. *v.* Massachusetts	138
Livingston *v.* Jefferson	111
v. Moore	114
v. Story	111, 199, 237
Livingstone *v.* Dorgenois	300
Lloyd *v.* Fulton	431
Locke *v.* United States	503
Lockhart *v.* Horn	528
Logan *v.* Patrick	120
v. The Eolian	66
Lombard *v.* Bayard	183
Long *v.* Converse	268
Lorin, Ex parte	299
Loring, Ex parte	299, 302
Lorman *v.* Clark	110
Lorway *v.* Lousada	97
Lothop *v.* Blake	494
Lottawanna, The	58, 59, 99
Louis Feuscher, Ex parte	424
Louisville R. Co. *v.* Setson	121, 135
Louisville, etc., R. Co. *v.* Gaines	432
Lowe *v.* Lowe	498
v. Williams	155
Lower *v.* United States	300
Lucas *v.* Bank	499
v. Brooks	475
Lucille, The	248, 250
Luckenbach *v.* Anderson	497
Lucy, The	244, 246, 251
Lulee, The	62
Luminary, The	503
Luth *v.* Luth	500
Luther *v.* Borden	171
Lyell *v.* Miller	456
Lyon *v.* Lyon	500
Macauley *v.* United States	345
Macdonnell, In re	310
Macomber *v.* Clarke	434
Magee *v.* Union Pac. R. Co.	160
Maggie Hammond, The	59, 61, 82
Maguire *v.* Card	67
Main *v.* Second Nat. Bank of Chicago	143, 175, 179
Mallow *v.* Hinde	132, 204, 440
Malone *v.* United States	352
Mankin *v.* Chandler	73
Mann *v.* Richardson	236
Manor *v.* McCall	300
Manro *v.* Almeida	70, 73, 88, 182
Manufacturers' Bank, In re	143
Manufacturing Co. *v.* Brack	138
Many, Ex parte	302
Marbury *v.* Madison	7, 8
Marengo, The	64
Margaret, The	78
Marin *v.* Lalley	247, 250
Marine Ins. Co. *v.* Hodson	239
Marion, The	61
Marqueze *v.* Bloom	265
Marsh *v.* Bennett	209, 429
Marshall *v.* Baltimore, etc., R. Co.	121, 135
v. Bazin	75
v. Beverly	205
v. Vicksburg	198
Martin *v.* Criscuola	176, 179
v. Hunter	3, 116, 425, 495
Marx *v.* Fore	498
Mary Anne, The	82
Mason *v.* Gamble	258
v. Haile	182
v. Laurason	494
v. Rollins	117, 137
Massachusetts *v.* Rhode Island	232
Massingill *v.* Downs	182, 183
Masterson *v.* Herndon	240
Maston *v.* McRea	405
Matthews *v.* McStea	266
v. Roberts	236
Mattoon *v.* Clapp	496
Maudeville *v.* Riggs	206
Mauldin *v.* Carroll	129
Maxwell *v.* Newbold	266
v. Stewart	499, 500
May, In re	435
v. Leclare	433
Maye *v.* Carberry	434
Mayhew *v.* Thatcher	499
Mayor *v.* Rainwater	300
McArthur *v.* Goddin	497
v. Porter	286
McCardle, Ex parte	307, 311
McCargo *v.* Chapman	239
McClurg *v.* Kingsland	142
McCollough *v.* Sch. Furniture Co.	155
McCollum *v.* Eager	247
McComb *v.* Commissioners	268
McCormic *v.* Deaver	495
v. Sullivant	117
McDearmid *v.* Fitch	300
McDermott *v.* Clary	498
McDonald *v.* Smalley	137
McDonnell, In re	410, 411
McElmoyle *v.* Cohen	496, 498
McElrath *v.* United States	350
McFarlan *v.* Harrington	494
McFarland *v.* White	496
McGarrahan *v.* Mining Co.	489
McGinnis *v.* Pontiac	62
McGinnithy *v.* White	112
McGlinchy *v.* United States	527, 528

	PAGE
McGrath *v.* Candalero	73
McGuire *v.* Commonwealth	266
McIver *v.* Wattles	289
McJilton *v.* Love	497
McKeever *v.* United States	344
McKinlay *v.* Morrish	71
McKinney *v.* Carroll	269
McKnight *v.* United States	345
McLaurens *v.* Monroe	498
McLean *v.* Lafayette Bank	189, 196
v. Winchester	494
In re	460
McLure *v.* Bencene	496
McMicken *v.* Perin	248
McMullin *v.* State	300
McNiel *v.* Holbrook	494
McNulty *v.* Batty	262
McNutt *v.* Bland	118
v. United States	292
McVicker *v.* Beedy	499
Mead *v.* Thompson	250
Mechanics' Bank *v.* Setons	205, 208, 481
Medbury *v.* State	269
Medora, The	90
Meek *v.* Meek	498
Meister *v.* Moore	431
Melhop *v.* Doane	499
Melvin *v.* Lyons	495
Mercer Co. *v.* Hacket	136
Merchants' & Mechanics' N. Bank *v.* Wheeler	155
Merill *v.* Dawson	406, 481
v. Petty	112, 246, 451
Merino, The	82, 140
Mesa *v.* United States	276
Messenger *v.* Mason	266
Mewster *v.* Spaulding	110, 194, 195
Meyer *v.* Del. R. C. Co.	155
Mezeix *v.* United States	348
Michoud *v.* Girod	247, 251
Middlesex Bank *v.* Butman	498
Middleworth *v.* McDowell	500
Miller *v.* Insurance Co.	260
v. Joseph	267
v. Nichols	261
v. Pennington	500
v. State	279
v. United States	86
Milligan, Ex parte	307, 308
v. Millege	206
Mills *v.* Brown	244, 269
v. Duryee	496, 500
Milne *v.* Van Buskirk	499
Milwaukee R. Co., Ex parte	299
Mining Co. *v.* Bullion Mining Co.	149
Minnesota Co. *v.* St. Paul Co.	120, 121
Mississippi *v.* Johnson	232, 235
Missouri River Tel. Co. *v.* First Nat. Bank	425
Mitchell *v.* Burlington	432
Mitzger, Ex parte	307
Moffat *v.* Soley	133
Molan *v.* Torrance	117, 121, 135, 287
Montalet *v.* Murray	124
Montgomery *v.* Anderson	145, 247, 249
v. Hernandez	30, 269, 270
Moore *v.* Huntington	206
v. Mississippi	266
v. Nelson	404
v. Robbins	250
v. State of Illinois	125
v. United States	341, 342, 348
Mordecai *v.* Lindsay	145
Morewood *v.* Enequist.	57
Morgan *v.* Beloit	433
v. Curtenius	278, 428
v. Morgan	120
v. Thomhill	250
Morrell *v.* United States	341
Morris' Cotton	81, 139
Moses Taylor, The	57, 67, 93
Mossman *v.* Higginson	124
Moulin *v.* Insurance Co.	498
Moutin *v.* Insurance Co.	501
Mowrey *v.* Ind. & C. R. Co.	429
Mrs. Alexander's Cotton	81, 82
M. R. Tel. Co. *v.* First Nat. Bank	57
Mudd *v.* Beauchamp	495
Muller *v.* Dows	122
Mumm *v.* Owens	475
Munns *v.* Dupont	481
Murdock *v.* City of Memphis	266, 269
Murphy *v.* United States	352
Mussina *v.* Cavazos	240
Myra Clark Whitney, Ex parte	299
Nabor, Ex parte	300
Narragansett, The	68
Nathaniel Hoper, The	77
National Bank *v.* Carpenter	200
v. Colby	143
Nations *v.* Johnson	499
Nazro *v.* Cragin	180, 189
Neale *v.* Neale	198
Neff *v.* Pennoyer	178, 186, 456
Neilson *v.* Layow	123, 270
Nelson *v.* Hill	196
v. Justices	301
v. Leland	92
Nesmith *v.* Shelden	171, 253, 254
Nestor, The	61, 62
Neustra, The	99, 100, 256
Neversink, The	62
New England, The	89
New Jersey *v.* New York	229, 232, 233
Steam Nav. Co. *v.* Merchants' Bank	66
New Orleans *v.* Gaines	219
v. Morris	183
v. Winter	116

	PAGE
New World, The, *v.* King	69
New York *v.* Connecticut	229, 429
Life Ins. Co. *v.* Hindren	268
Newcomb *v.* Wood	180
Newell *v.* Norton	84
Newman, Ex parte	299, 300
v. Goza	496
Newton *v.* Mutual Benefit Life Ins. Co.	496
Nicholas *v.* Nicholas	500
Nichols *v.* Levy	431
v. United States	340, 342
v. White	481
Nicholson Pav. Co. *v.* Mayor	301
Nickols *v.* Brunswick	472
Nonsuch, The	244, 246
Norris *v.* Crocker	113
v. Jackson	260
North Carolina *v.* Dewey	116
Northern Ind. R. Co. *v.* Mich. Cent. R. Co.	137, 441
Northern Railroad *v.* The People	265
Norton *v.* Rich	99
Norwich *v.* Wright	92, 93
Norwood *v.* Cobb	498
Nourse *v.* Allen	196
Nudd *v.* Burrows	175, 180
Oats *v.* National Bank	432
Ober *v.* Gallagher	130
O'Brien *v.* Brown	120
v. Weld	267
Ocean Ins. Co. *v.* Fields	199, 234
Ocean Queen, The	96
O'Doud *v.* Russell	240
Oelrichs *v.* Spain	433
Ogle *v.* Lee	141, 172, 254
O'Hara *v.* MacConnell	193
Ohio L. and F. Co. *v.* Debold	114
and Miss. R. Co. *v.* Wheeler	121
Trust Co. *v.* Debolt	432
O'Keefe *v.* United States	348
Olcott *v.* Supervisors	432
Oldens *v.* Hallett	496
Oliver *v.* Alexander	295, 401
v. Pratt	196, 218
Ordway *v.* Central Nat. Bank	57, 425
v. Conroe	494, 496
O'Riley *v.* Morse	142, 426
Orleans *v.* Phœbus	431
Orne *v.* Townsend	70
Osborn *v.* Bank	113, 116, 132, 149, 230
v. Mich. A. L. R. Co.	120
Osborne *v.* Mobile	266
v. President, Directors, etc.	201
v. United States	81
Osgood *v.* Chicago, etc., R. Co.	143, 167
v. Chicago, D. & V. R. Co.	156
Owing *v.* Hull	494
Owings *v.* Kincannon	257
v. Norwood	113, 270
v. Speed	269
Paca *v.* Dutton	501
Pacific R. Co. *v.* Ketchum	116, 117, 133, 143, 247, 277
Packer *v.* Nixon	172, 254
Packet Co. *v.* Clough	475
Packet, The	62
Paine *v.* Schenectady Ins. Co.	497
v. Wright	431
Palmer *v.* Call	155
v. Marston	266, 268
Palte *v.* Derby	426
Panama, The	91
Parcels *v.* Johnson	249, 268
Parish *v.* Ellis	249
Parker *v.* Bigler	463
v. Cartzler	472
v. Hotchkiss	129
v. Judges	430
v. Williams	494
Parkhurst *v.* Kinsman	210
Parkman *v.* Overman	110, 137, 148
Parks, Ex parte	165, 308
Parson *v.* Hunter	528
Parsons *v.* Howard	441
v. Lyman	111
Partington, Ex parte	309
Paschal, In re	436
Patapsco Guano Co. *v.* Morrison	431
Ins. Co. *v.* Southgate	403, 406, 407, 478
Patapsco, The	60, 61, 62
Patrick *v.* Gibbs	495
Patterson *v.* Boon Co.	149
v. McLaughlin	429
v. State	497
v. United States	349, 428
v. Winn	178
Payne *v.* Hook	111, 142
Payton *v.* Bliss	164
v. Robertson	112
Pearce *v.* Olney	497
Peaslee *v.* Haberstro	227
Peck, Ex parte	408
v. Sanderson	265
Peet *v.* McGraw	240
Pelton *v.* Platner	494, 499
Pendleton *v.* Evans	192, 216
Penhallow *v.* Doan	80, 429
Penn *v.* Quicksilver Co.	138, 229, 230, 244, 349
Pennell *v.* Wyant	501
Pennoyer *v.* Neff	495
Pennsylvania *v.* Wheeling Br. Co.	111, 185
Penywit *v.* Eaton	289

PAGE

People *v.* Baker 500
v. Board of Police . . 300
v. Darwell . . . 500
v. Easton 301
v. Green 301
v. Head 301
v. Hilliard . . . 301
v. Judge, etc. . . . 300
v. Loucks 301
v. Pearsons . . . 301
v. Smith 500
v. Supervisors . . . 301
v. Thompson . . 300, 301
People's Ferry Co. *v.* Beers . . 58
Pepin *v.* Lachenmeyer . . . 496
Pepper *v.* Dunlap 249
Perkins *v.* City of Watertown 176, 179
v. Hart 172
v. United States . 527, 528
Perrin *v.* United States . . 339
Perry *v.* Corning 194
Perseverance, The . . . 64
Peters *v.* Prevost 479
Peterson *v.* United States . . 286
Petigrew *v.* United States . . 259
Pettibone *v.* Derringer . . . 407
Peyton *v.* Howard . . . 66
v. Robertson . . . 244
Pharo *v.* Smith 84
Phebe, The 463
Phelps *v.* Holker 499
Philadelphia, etc., R. Co. *v.* Stimson 184, 221
Philadelphia *v.* The Collector . 138
Philip Henrich, In re . . . 248
Phillip *v.* Nock 258
Phillips *v.* Moone 259
Pickett *v.* Bates 495
Picquet *v.* Swan . 129, 179, 181, 189
Pierce *v.* West . . . 197, 212
Pine Grove *v.* Talcott . . . 432
Pioneer, The 85
Piquignot *v.* Penn. R. Co. . . 124
Pitcher *v.* United States . . 342
Pitman, In re 435
Pittilon *v.* Noble . . . 143, 152
Pittman *v.* Hooper . . . 65
Platt's Appeal 500
Pleasants, Ex parte . . . 435
Plitt, Ex parte 460
Plummer *v.* Conn. Mut. Ins. Co. . 433
Plymouth, The 69
Pollard, The 475
v. Baldwin . . . 498
v. Dwight . . 117, 234
v. Pickett . . . 122
Pomeroy *v.* Main 185
v. N. Y. & N. H. R. Co. . 143
v. State Bank . 178, 240
Pond *v.* Vermont Valley R. Co. . 131

PAGE

Porcheller *v.* Bronson . . . 496
Porter *v.* Foley 257
v. Harris 301
Portland *v.* United States . 272, 340
Postmaster-General *v.* Cross . 112
v. Early . 123
Potter *v.* Gardner . 206, 207, 208
v. Muler 142
v. Wilson 142
Poultney, Ex parte . . . 300
v. La Fayette 111, 184, 188, 201, 221
Powell *v.* Knox 501
Pratt *v.* Fitzhugh . . 113, 243
v. King 496
Prentice *v.* Pickersgill . . . 289
Prentiss *v.* Barton . . . 115
v. Brennan . . 116, 124
v. Zane 260
Prescott, The 460
Price *v.* Hekok 499
v. Ward . . . 498, 500
Prigg *v.* Commonwealth . . 270
v. Pennsylvania . . . 125
Prime *v.* United States . . 352
Propeller Commerce, The . . 92
Protector, The . . 246, 251, 257
Providence Bank *v.* Billings . 150
Provine *v.* United States . . 349
Pryor *v.* Moore 498
Public Schools *v.* Walker . . 290
Public Works *v.* Columbia Col. 496, 497
Pueblo Case, The . . . 33
Pugh *v.* United States . . . 349
Pullian *v.* Christian . . . 248
Pulte *v.* Derby 141

Railroad Co. Ex parte . 177, 182, 189, 246, 249, 302
v. Alling . . . 302
v. Clinton Co. . . 301
v. Harris . 116, 121, 135
v. Maryland . . 266
v. McMinley 155, 158, 167
v. Kountz . . 157
v. Pollard . . 475
v. Swasey . . 248
v. Whitton 57, 110, 121, 135
v. Wiswell . 240, 300
Railway Co., Ex parte 128, 248, 303
v. Ramsey 156, 166, 231, 244
Raines *v.* United States . . 349
Raleau *v.* Barnard . . . 124
Rambler, The 84
Ramsey *v.* Allege . . . 60
v. United States . . 341
Randall *v.* Phillips . . . 201

PAGE

Randolph, Ex parte . . 309, 487
v. Kesler . . . 495
Rangley v. Webster . . . 498
Ranson, Ex parte . . . 303
Rapahoe Co. v. Kansas, etc., . 118
Raymond v. United States . . 528
Read v. Consequa . . . 210
Reading v. Cummings . . . 300
Reber v. Wright . . . 495, 498
Rector v. Ashley . . 265, 269, 270
Reed, Ex parte 308
v. House 183
v. Hussey 73
Reg. v. Chichester . . . 298
Reichart v. Felps . . . 270
Reid v. Boyd 498
Reilly v. Golding . . . 120
Removal cases . 115, 147, 151, 155, 156, 157, 277
Republic Ins. Co. v. Williams . 175, 179, 180
Revenue Cutter, The . . . 58
Reynolds v. United States . . 449
Rhoades v. Silin 214, 215, 406, 479, 481
Rhode Island v. Massachusetts . 185, 199, 229, 285
Ribon v. Railroad Co. . . 205, 441
Rice v. Huston . . . 119, 215
Richard Busteed, The . . . 59
Richardson v. Golden . . 214, 480
Richmond v. Milwaukee . . 245
etc., R. Co. v. Railroad Co. 267
v. Smith . . . 431
Ricketts v. Henderson . . . 499
Riggs v. Johnson Co. . . 183, 301
Rio Grande, The 428
Rison v. Cribbs 113
Ritchie v. Manro 243
Roach v. Chapman . . . 58
v. Hulings . . 195, 230
Robbins, Ex parte . . . 35
Robert v. Hodges . . . 496
Robert Fulton, The . . 57, 60
Roberts, Ex parte . . . 292
v. Bolles . . . 432
v. Dallas . . . 6
v. United States . . 344
Robertson v. Barbour . . . 495
v. Carson . . . 132
v. Cease . . . 137
Robins v. Ward 499
Robinson, Ex parte . 248, 303, 435
In re 436
v. Campbell . . 111, 185
v. Insurance Co. . . 180
v. Payton . . . 498
v. Satterlee . . . 212
Rockhold v. Rockhold . . . 267

PAGE

Rodd v. Heartt . . . 242, 245
Rogers v. Burlington . . . 240
v. Guinn 497
v. Law 252
Roman v. United States . . 345
Root v. Root 500
Rosenbach v. Dreyfuss . . 179, 180
Ross v. Carpenter 198
v. Duval . . . 182, 235
v. Georgia 425
Rowland v. Jarvis . . . 497
Rowley v. Williams . . . 238
Ruggles v. Simonton . . . 430
Rumbold v. Forteath . . . 237
Rush v. Parker 244
Russell v. Ashley . . 30, 178
v. Clarke . . . 132
v. Elliott . . . 301
v. Kearney . . . 495
v. McLean 178, 186, 221, 478
v. Thomas . . . 428
Russia, The 463
Ryan v. Bindley 243

Sackett v. Davis 136
Sadler v. Hoover 171
v. Hudson . . . 129, 182
Sadley v. Hover 253
Sage v. Railroad . 247, 249, 251, 407
v. Tanszky 180
Sall v. Cent. R. Co. . . . 246
Saltmash v. Tuthill . . . 429
Sampson v. Welch . 244, 246, 251
Samuel, The 82, 96, 403, 407, 481
Samuel Strong, The . . . 59
San Jago, The 140
Sandwich, The 62
Sanford v. Portsmouth . 3, 175
v. United States . . 339
Sarah, The . . 80, 81, 139, 296
Sargeant v. Biddle . . . 481
Saule v. United States . . 487
Saulet v. Shepherd . . . 169
Saunders v. Gould . 172, 253, 254
Sawin v. Kenny 179
Sawyer v. Oakman . . 73, 402
Schacker v. Hart. Fire Ins. Co. . 242
Schlesinger v. United States . 342
Schollenberger, Ex parte . . 122
School Ins. v. People . . . 300
Schooner Marion, The . . . 6
Schoonmaker v. Lloyd . . 497
Schuchardt v. The Anglique . 90
Schwabacker v. Reilly 30, 71, 177, 179
Schwaub, Ex parte . . 299, 303
Scott v. Allen 30
v. Cleveland . . . 495
v. Jones . . . 266, 269
Seaborn v. Henry . . . 495
Searle v. Railroad . . . 430

PAGE
Seckel *v.* Backhaus . . . 133
Secomb *v.* Railroad . . . 431
Secombe, Ex parte . . . 303
Secretary *v.* McGarraghan . . 300
Sedwick *v.* Fridenburgh . . 145
Segee *v.* Thomas 191
Seldon *v.* Hendrickson . . 61
v. Sill 136
Sellers *v.* Corwin 178
Sere *v.* Petot 135
v. Pitot 116
Sessieur *v.* Price 270
Sevier *v.* Huskell 266
Sewing Machine Co. . . . 114
Shankland *v.* Washington . 244, 261
Sharp *v.* United States . . 347
Shaw *v.* Collier 91
Shedds *v.* Barrow . . . 132
Sheets *v.* Seldon 250
Shelby *v.* Gay 431
Sheldon *v.* Sill . . 113, 118, 135
Shelton *v.* Tiffin . . 115, 118, 137
v. United States . . 34
Shepart *v.* Taylor . . 57, 89
Shephard, In re 429
Shepherd *v.* Graves . . . 137
Sherman *v.* Champlain Co. . . 489
Shields *v.* Barrow 132, 147, 215, 440
v. Thomas . . . 499
Ship Virginia, The . . . 60
Shoemaker *v.* Mechanics' Bank . 144
Shrew *v.* Jones 183
Shrewsbury *v.* United States . 350
Shufford *v.* Cain 134
Shufield *v.* Buckley . . . 500
Shutte *v.* Thompson . 404, 407, 481
Siebald, Ex parte . 165, 308, 309
Silliman *v.* Hudson R. Br. Co. 254, 255
Sillman *v.* Hud. Riv. R. Co. . 171
Silsby *v.* Fort 169
Silver Lake Bank *v.* Harding . 494
Silverhill *v.* United States . . 291
Silvey *v.* United States . . 348
Simms *v.* Guthrie 119, 120, 206, 209
Simons *v.* Cook 494
Simpson *v.* Brooks . . . 456
v. Greely . . . 240
v. Railroad . . . 261
Sims *v.* Sims 496
Sipes *v.* Whitney . . . 495, 497
Siren, The 80
Sizer *v.* Many 258
Skillern *v.* May 287
Slack *v.* Walcott 495
Slaughter House Cases 161, 428, 430
Slawson *v.* United States . 347, 349
Slocum *v.* Pomeroy . . . 285
Smith, Ex parte . . . 117, 300
v. Adsit . . . 266, 269
v. Burnham . . . 185
PAGE
Smith *v.* Clark 257
v. Condry 68
v. Gaines 179
v. Honey . . . 242, 244
v. Kernochen . . 119, 121
v. Little 129
v. Maryland . . . 264
v. Redden 501
v. Ross 499
v. Sac County . . . 260
v. Seck Co. . . . 260
v. Smith 500
v. United States 123, 347, 349, 487
v. Vaughen . . 172, 254
Smyth *v.* Strader 241
Snyder *v.* Wise . . . 496, 501
South Ottawa *v.* Perkins . . 431
Sparrow *v.* Strong . 113, 240, 244
Spaulding *v.* Tucker . . . 472
Spencer *v.* Brockway . . . 495
v. United States . . 347
Stafford *v.* Union Bank . . 289
Starbuck *v.* Murray . . 499, 500
Starkweather *v.* Loomis . . 495
State *v.* Adams 425
v. Armington . . . 500
v. Com. Council . . . 300
v. Duffy 300
v. Helmer . . . 495, 497
v. Hull 301
v. Kirkpatrick . . . 425
v. McBride 425
v. Pike 425
v. Warmouth . . . 300
State Bank *v.* Knoop . . . 113
State Tax on Foreign-held Bonds 149
Steamboat Burns . . . 241, 257
Company, The . . 67
Co. *v.* Chase . . 57
London, The . . 401
N. E., The . . . 89
Orleans, The . 58, 65
Steamer Virginia *v.* West . . 276
Steamship Circassian, The . . 60
Stearns *v.* United States 65, 125, 278
Steere *v.* Tenney 494
Steiger *v.* Bonn 129
Stein *v.* Bouman 407
v. Bowman . . . 478, 479
Steins *v.* Franklin Co. . . . 265
Stevenson *v.* Williams . . . 158
Stewart *v.* Ingle . . . 278, 428
v. Salmon . . . 252
Stimpson *v.* Brooks . . . 458
v. Pond . . . 528
v. Westchester . . 428
Stone *v.* Bishop 121
v. Palmer 489
v. Wisconsin . . . 431

	PAGE
Stoner *v.* Ellis	489
Story, Ex parte	287
v. Livingston 185, 207, 208, 216, 217, 219	
v. Rennell	88
Sturgess *v.* Harold	275
Sturgiss *v.* Boyer	92
St. Jago de Cuba, The	64
St. Lawrence, The 57, 58, 59, 186	
St. Louis R. Co. *v.* Indiana & St. L. R. Co.	121
St. Louis *v.* Ferry Co.	149
St. Luke's Hospital *v.* Barclay 8, 119	
v. Barkley	98
Stockwell *v.* Coleman	498
v. McCracken	499
Strade *v.* Churchill	494
Stratton *v.* Jarvis	246
Strauder *v.* West Virginia	161
Strawbridge *v.* Curtis 114, 133	
Strong, Petitioner	301
Stub *v.* McCrillus	300
Sudbury *v.* Stearns	300
Sumner *v.* Hicks	431
v. Marcy	496
Sunny Side, The	472
Supervisors *v.* United States 302, 431	
Sutton *v.* Bancroft	289
v. Manderville	478
Suydam *v.* Beals	200
v. Williamson 169, 170, 260	
Suydan *v.* Williamson 240, 244, 260, 285	
Swasey *v.* North Car. R. Co.	116
Swift *v.* Tyson	432
Syms *v.* Lyle	237
Tait *v.* De Ende	498
Talbot *v.* Janson	80
v. Wakeman	70
Tancred *v.* Christy	260
Tardy *v.* Morgan	497
Tarvin *v.* Rankin	500
Taylor, Ex parte 299, 300	
The	56
v. Barron	495
v. Benham	204
v. Brigham	179
v. Cook 131, 440	
v. Maguire 210, 270	
v. Merchants' Fire Ins. Co.	194
v. Salmon	229
v. Secor	431
v. United States	503
Tennessee *v.* Davis 163, 164	
Bank *v.* Bank of Louisville	268
Terry *v.* Commercial Bank	248
v. Imp. Fire Ins. Co.	153
Texas *v.* Chiles	475
v. White	268
Thaxter *v.* Hatch	135
The Akron C. and P. Co.	471
The Assessors *v.* Osborne	138
The Aurora *v.* United States	83
The Avery	460
The Baltimore	457
The Bay City	458
The Binghamton Bridge	265
The Brig Alerta *v.* Moran	80
The Caroline *v.* United States	78
The Exchange *v.* McFadden	295
The Floyd Acceptances	122
The King *v.* Luddis	309
The License Cases	266
The Liverpool Packet	457
The Moses Taylor	2
The New World *v.* King	69
The Pacific	458
The Phil., etc., R. Co. *v.* Stimpson	111
The Protector	257
The Pueblo Case	33
The Steamboat Co. *v.* Chase	93
The Union Insurance Co. *v.* United States	296
Thom *v.* Batory	500
Thomas, In re	411
v. Lane 68, 83, 170	
v. Robinson	494
v. Scotland	431
v. Woodbridge	248
Thompson *v.* Dean 247, 250	
v. Lee Co. 136, 432	
v. Manrow	495
v. Selden	434
v. Smith	485
v. Whitman	498
Thomson *v.* Butler	243
Thornhall *v.* The Collector	164
Thorpe *v.* Simmons	405
Thrasher *v.* Ingram	496
Thurston *v.* U. P. R. Co. 149, 156, 160	
Tilton, The	64
Tinstman *v.* First National Bank	243
Tipton *v.* Mayfield	498
Titson *v.* United States 339, 344	
Todd *v.* Daniel	240
Toland *v.* Sprague 127, 129, 177, 179, 181, 189, 234, 239	
Toohey *v.* Harding	489
Tooker *v.* Thompson	406
Torny *v.* Beardsley	110
Towboat Co.	69
Town *v.* Steamship Co. 83, 85	
of Ohio *v.* Marcy	260
Parolet *v.* Clark	123
Tracy *v.* Holcomb 249, 250, 268	
Traders' Bank *v.* Campbell	205
Trafton *v.* Nougues	149
Traver *v.* Commissioners	301
Trayden *v.* Justis	498

PAGE

Treadwell *v.* Joseph . . 70, 71, 83
Trebilcoch *v.* Wilson . . . 269
Trial, The 401
Trigg *v.* Conway 496
Triplett *v.* Bank 434
Troy *v.* Evans 243
Iron and Nail Fac. *v.* Corning . . . 218, 456, 457
Trust Co. *v.* Railroad Co. . . 430
Tufts *v.* Tufts 220
Turner, In re . . . 110, 148
v. Bank 137
v. United States . . 340
Twitchell *v.* The Commonwealth 264, 270

Udell *v.* Davidson . . . 270
Union Bank *v.* Geary . . . 201
v. Stafford 117, 118, 131
Ins. Co. *v.* Kellogg . . 429
v. United States . 81
Sugar Refinery *v.* Matheeson 129
United States *v.* Adams 278, 291, 292, 428
v. Addison . . 303
v. Alberty . . 439
v. Alire . . . 339
v. Ambrose . . 449
v. Ames . . . 74
v. Anderson . . 347
v. Armstrong's Foundry . . 296
v. Arwo . 127, 439
v. Avery . . 255
v. Ayers . . 292
v. Backus . . 440
v. Bailey 153, 254, 255
v. Baker 122, 127, 439
v. Ballard . . 526
v. Bank of Met. . 122
v. Barney 54, 125, 136
v. Barrels of Alcohol 85
v. Baugh . . 420
v. Bayley . . 171
v. Bench . 56, 254
v. Betsey . . 92
v. Bevans 54, 125, 126, 136
v. Biebusch . . 495
v. Bird . . . 439
v. Blackford . . 422
v. Blaisdell 33, 34, 421
v. Block . 110, 240
v. Bostwick . 339, 342
v. Bradley . 123, 255
v. Breitling . 178, 186
v. Bridgman . . 129
v. Briggs . 170, 255
v. Bromley . 164, 259
v. Brown . 526, 528

PAGE

United States *v.* Buford . . 487
v. Burnes . 344, 420
v. Burnett . . 423
v. Burr . . . 418
v. Canal Co. . . 430
v. Carey . . 276
v. Carter . . 435
v. Caton . . 435
v. Chicago . . 254
v. Cigars . . 472
v. City Bank . 170, 171
v. Claflin . . 138
v. Clark 118, 136, 346, 352
v. Cogswell . . 464
v. Collier . . 487
v. Collins . 430, 449
v. Commissioners . 300
v. Conaut . . 421
v. Cook . . . 526
v. Cooledge 54, 125, 158, 435
v. Coppersmith . 455
v. Cornell . . 127
v. Cornie . . 34
v. Corrie . . 439
v. Cruikshank . 421
v. Crussell . . 292
v. Curtis . . 422
v. Daniel . . 255
v. Daniels . . 172
v. Darling . . 472
v. Davidson . . 29
v. Davis . . 411
v. Devaughan . 435
v. Devereux . . 123
v. Devlin . . 449
v. Dickinson . . 420
v. Donlan . 126, 136
v. Doughty . . 33
v. Douglass . . 449
v. Dunham . . 431
v. Dunn . 56, 122
v. Dustin . . 527
v. Ebart . . 420
v. Eckford 113, 118, 136, 487
v. Edward . . 487
v. Eggleston . . 487
v. Elliasen . . 261
v. Emerson . . 435
v. Fossalt . . 248
v. Freeman . 127, 248
v. Furlong . . 126
v. Gardner . . 449
v. Gaussen . . 487
v. Gear . . . 56
v. Girault . . 240
v. Godbold . . 30
v. Gomez 275, 289, 428

		PAGE
United States	*v.* Goodwin	249
	v. Grand Trunk R. Co.	431
	v. Graves	183
	v. Hage	123, 275
	v. Hall	124
	v. Halliday	55
	v. Halstead	182
	v. Hamilton	418
	v. Hare	422
	v. Harker	463
	v. Hawkins	286
	v. Haynes	145
	v. Hirsch	526, 527
	v. Hoffman	293, 296
	v. Holliday	125, 126
	v. Holmes	126
	v. Huckabeer	284
	v. Hudson	54, 118, 125, 136, 138, 435
	v. Hughes	234, 476
	v. Humphreys	182, 183
	v. Ingersol	418, 466
	v. Insurgents	422
	v. Irvine	125, 526
	v. Jackalow	127, 140
	v. Jackson	421
	v. Jacoby	420, 421
	v. Johns	494
	v. Johnson	302
	v. Jones	487
	v. Kaufman	343
	v. Keokuk	183
	v. Kimbal	300, 347, 349
	v. King	260
	v. Knight	181, 182, 290, 431
	v. Kuhn	487
	v. Lancaster	125, 172
	v. Lathrop	57, 425
	v. Lawrence	300
	v. Leonard	422
	v. Little Charles	74
	v. Maguire	421
	v. Marchant	127
	v. Martin	487
	v. Maun	436
	v. Maxwell	42
	v. Mayo	527
	v. McAvoy	33
	v. McDowell	112
	v. McFarlane	420
	v. McGill	126, 127, 439
	v. McKee	423
	v. McLemone	314
	v. Mingo	439
	v. Mitchell	490
	v. Monson	145
	v. Moore	191, 306
	v. Morris	423
	v. Morrison	183, 431
	v. Murphy	423
	v. Myers	476
	v. New Orleans	300, 302
	v. Noelke	421
	v. Norton	527
	v. Nourse	248
	v. O'Brian	527
	v. O'Callahan	420
	v. O'Grady	345, 346
	v. O'Sullivan	423
	v. One Horse	27
	v. Package	456
	v. Parrott	189, 479
	v. Pings	180
	v. Pirates	180, 420
	v. People	269
	v. Peters	149, 301
	v. Pugh	294, 296, 348
	v. Rand	50
	v. Ravara	8
	v. Reed	255, 431, 449, 450
	v. Reese	161
	v. Robertson	64
	v. Robins	424
	v. Rosenburgh	171, 255
	v. Ross	127, 347
	v. Russell	243, 339, 349
	v. Sawyer	420
	v. Schooner Sally	80
	v. Schumann	34
	v. Scott	420
	v. Seamen	300
	v. Seuart	422
	v. Shackelford	449
	v. Shares of Capital Stock	81
	v. Smith	404, 418, 456, 463, 464
	v. Southmayd	422
	v. State Bank	343
	v. Stone	171, 453, 454
	v. Tallman	449
	v. The Chusan,	62
	v. The Little Charles	71
	v. The Steamship Queen	79
	v. Thompson	439, 267
	v. Three Tons	433
	v. Three Tons of Coal	476
	v. Tilden	408
	v. Tingey	123
	v. Tracy	179
	v. Tuska	421, 449
	v. Tyler	255
	v. Vanzandt	487
	v. Waller	42
	v. Watkins	526
	v. Watson	34
	v. Weed	82, 255

PAGE

United States *v.* White 125, 526, 527
v. Wiley . . 528
v. Williams 422, 429, 435, 449, 481
v. Wilson . 255, 449
v. Woodruff . . 449
v. Worrell . . 125
v. Wright . 527, 528
v. Young 292, 420, 428
v. 28 Packages . 434
v. 28 Packages of Pins 86
v. 37 Barrels of Rum 145
v. 469 Barrels . 434
v. 5100 in Specie . 145
v. 500 Barrels 458, 463
Ex parte . 49, 301
University *v.* People . . 265, 269
Upton *v.* Triblecock . . 27, 460

Vallandigham, Ex parte . 7, 428
Van Antwerp *v.* Hulbard . 143, 144
Van Arnam, Ex parte . . 310, 428
Van Orden, Ex parte . . 278, 428
Van Rensselaer *v.* Kearney . . 431
Vannevar *v.* Bryant . . 148, 155
Vansant *v.* Gaslight Co. . . 252
Vattier *v.* Hinde 117, 121, 132, 189, 204, 209, 481
Vaughan, The 100
Venable *v.* Richards . . . 152
Venice, The 82
Ventremaitre, In re . . . 310
Verden *v.* Coleman . . 248, 268
Victor *v.* Cisco 164
Villabolos *v.* United States . . 275
Virgil Paris, Ex parte . . . 463
Virginia, The . . . 62, 76
v. Rivers . . . 161
v. West Virginia . . 230
Von Brocken *v.* Brooklyn . . 431
Voorhees *v.* Bank of United States 234
Voss *v.* Luke 435

Wakeley *v.* Muscatine . . 300
Walburn *v.* Babbitt . . . 285
v. Skinner . 116, 118, 119
Walden *v.* Bodley . 194, 197, 211
Walker *v.* Beal 119
v. Commissioners . . 431
v. Parker . . . 481
v. Taylor . . 244, 269
v. United States 112, 242, 243, 244
Wallace *v.* Clark . . . 178, 186
v. Holmes . . . 208
Wallen *v.* Williams . . . 429
Walls *v.* Thornton . . . 90
Walsh *v.* Rogers . . . 92
Walter *v.* Belding . . . 300
Walton *v.* United States . 487

PAGE

Waltz *v.* Amer. Ex. Co. . . 138
Wanata, The 99
Wanderer, The 140
Ward *v.* Arredondo . 114, 117, 135
v. Chamberlain . 172, 183, 254
v. Peck 64
v. Quinlivin . . . 497
v. State . . . 279, 280
v. The Ogdensburg . . 68
v. Tompson . . . 58
Warden *v.* Town Council . . 300
Warfield *v.* Chaffee . . . 268
Waring *v.* Clark 66
Warmouth, Ex parte . . 165, 296
Warner *v.* Fowle 164
Warren Manufac. Co. *v.* Etna Ins. Co. 498, 500
Warren *v.* Flagg . . . 494, 500
v. McCarthy . . . 500
v. Wade 495
Washabaugh *v.* Entriken . . 496
Washington, The 70
Waters *v.* United States . . 349
Watkins, Ex parte . 306, 307, 309
Watson *v.* Bondurant . . . 110
v. Jones 430
v. Sutherland . . . 433
v. The City Council . 266
Watts *v.* Waddle 497
Wave, The 66
Way *v.* Bagshaw 236
Waymouth *v.* Railroad Co. . . 499
Weaver *v.* Owens . . . 59
Webster *v.* Cooper . 117, 253, 431
v. Hunter . . . 498
v. Lee County . . 302
Weed *v.* Kellogg 407
Sewing Machine Co. *v.* Wicks . . 116, 119, 179
Weeks *v.* Pearsons . . . 500
Weems *v.* George . . . 124
Welch *v.* Sykes 499
Wells *v.* McGregor . . . 227
West *v.* Aurora 149
v. Brashear 275
v. Randall 206
v. Smith . . . 179, 197
Tennessee *v.* Citizens' Bank 266
Wisconsin R. Co. *v.* Foley 289
Western Metropolis 84
Western Union Tel. Co. *v.* Rogers 242, 243
Westerville *v.* Lewis . . . 498
Weston *v.* Charleston . . . 109
v. City Council . . 266
Wethers *v.* Buckley . . . 264
Weyanga *v.* Ayling . . . 171
Weyanwega *v.* Ayling . . . 255
Wheeler *v.* Raymond . . . 496
Wheeling *v.* Mayor . . . 301

	PAGE
Whipple *v.* Cumberland Cotton Co.	472
Whitaker *v.* Bramson	497
White *v.* Commonwealth	125
v. Railroad	136
v. Smith	269
v. Strother	495, 496
v. Turk	176, 254
v. Vermont & M. R. Co.	136
White's Bank *v.* Smith	269
Whiting *v.* Bank of United States	219, 247, 250
Whitlock *v.* The Thales	62
Whitney, Ex parte	111, 302
v. Bank	251
v. Cook	277
v. Hunt	403
Whittaker *v.* Murray	498
Whittlesey *v.* United States	352
Wicliffe *v.* Hill	481
v. Owings	137, 199
Wiggins *v.* Gray	172, 254
Wigman *v.* Southard	427
Wilcox *v.* Cassock	498
v. Hunt	179
Wilder *v.* Union Nat. Bank	149
Wilie *v.* Cox	248
Willard *v.* Dorr	65
Willford *v.* Miller	479
William D. Rice, The	64
William Many, Ex parte	299
Williams *v.* Bank	240, 257
v. Bankhead	441
v. Benedict	183
v. Bruffy	265
v. Norris	266, 269
v. Suffolk Ins. Co.	432
v. Wilkes	494
Williamson *v.* Berry	431
Wills, Ex parte	307
Wilson Sewing Machine Co. *v.* Jackson	405
Wilson *v.* City Bank	124
v. Fisher's Ex.	134
v. Graham	194
v. Insurance Co.	240
v. Jackson	498
v. Life and Trust Ins. Co.	257
v. Sandford	141, 258, 259, 426
v. Stolly	203
Wilson's case	309
Winchester *v.* Jackson	289
v. United States	347
Winder *v.* Caldwell	427
Windsor *v.* McVeigh	267
Winter *v.* Simonton	481
Winthrop *v.* Ins. Co.	405
v. Union Ins. Co.	479, 480
Wiscart *v.* Dauchy	7
Wisconsin *v.* Duluth	113
Wise *v.* Columbia Turnpike Co.	242, 260, 262
v. Turnpike Co.	242
Withenbury *v.* United States	255
Withers *v.* Buckley	264
Wolf *v.* Rabaud	115
v. Stix	266
v. Usher	253
Wood, Ex parte	427
v. Davis	117, 118
v. Kellogg	478
v. Mathews	167
v. Wagnon	235
Woodman *v.* Latimer	431
Woods *v.* United States	503
Woodward *v.* Tremere	498, 499
Woodworth *v.* Edwards	235
Worcester *v.* Georgia	264, 270
v. Truman	209
Wormley *v.* Wormley	118, 132, 205, 208
Worthy *v.* Commissioners	265
Wright *v.* Ellison	434
v. Wersinger	499
Wyman *v.* Southard	172, 182, 183, 185, 429
Yeaton *v.* Fry	481
v. Lenox	257
Yerger, Ex parte	7, 307, 311
York City *v.* Miln	125
York Co. *v.* Central R. Co.	481
Young *v.* Bryan	135
v. Pott	205, 208
Yungling *v.* Johnson	429
Zane *v.* The President	58
Zeller *v.* Switzer	249
Zyanga del Valie *v.* Harrison	243

FEDERAL PLEADING, PRACTICE AND PROCEDURE.

CHAPTER I.

JUDICIAL POWER OF THE UNITED STATES.

§ 1. **Independent powers of the legislative, judicial and executive departments.**—The wisdom of those concerned in framing the Constitution of our government is nowhere more conspicuous than in those provisions of it which relate to the judicial power. They were familiar with the theories of political philosophers as well as the experiences of other nations in their efforts to establish free governments, and, with the knowledge derived from these sources, they wisely resolved that our government should consist of three departments — legislative, judicial and executive — each having powers to be exercised independent of the others. These elements had been urged as essential to the success of a free government by patriots, statesmen and speculative philosophers, and it was believed by them, if not generally regarded as a maxim, that these three necessary departments of a government should be kept separate and distinct and independent of each other.

The distinguished political writer Montesquieu had maintained this doctrine with great force and vigor in his commentary on the English Constitution, wherein he observed: "When the legislative and executive powers are united in the same person or in the same body of magistrates there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws or execute them in a tyrannical manner;" that were the judicial power "joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be the legislator:" and that "where it is joined to the executive

power, the judge might behave with violence and oppression." And he concludes by saying: "There would be the end of everything were the same man, or the same body, whether of the nobles or of the people, to exercise these three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."[1]

Sir William Blackstone had also impressed the necessity of an independent exercise of these functions of a well-regulated government, in his usual terse and forcible style. In his Commentaries on the Laws of England, he observes: "In all tyrannical governments the supreme magistracy, or the right both of making and of enforcing laws, is vested in the same man, or one and the same body of men; and wherever these two powers are united together there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. But where the legislative and executive authority are in distinct hands, the former will take care not to intrust the latter with so large a power as may tend to the subversion of his own independence, and therewith of the liberty of the subject."[2]

It requires no argument to show the importance of a judiciary department of the government of all civilized people, or that the scope of judicial power should be co-extensive with the legislative department. If it were otherwise there would be no power to enforce the rights of persons, and there would be no remedy for a violation of those rights.

On this subject Mr. Story observes: "Where there is no judicial department to interpret, pronounce and execute the law, to decide controversies and to enforce rights, the government must either perish by its own imbecility, or the other departments of government must usurp powers for the purpose of commanding obedience, to the destruction of liberty."[3]

There must be a judicial power to give effect to the will of the legislative power, and the want of this was among the vital defects of the original confederation of the states.[4]

[1] Montesquieu, B. 11, ch. 6.

[2] 1 Bl. Com. 146. See also The Federalist, No. 47.

[3] Story on the Const. § 1574. See also 1 Kent Com. 294.

[4] The Federalist, Nos. 33, 39, 80; 1 Story on Const. 344–384.

§ 2. **Where the judicial power is vested.**—The Constitution declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[1]

It has been maintained with much ability that, under this provision, Congress had no discretion as to the creation or organization of a Supreme Court and of inferior courts; that the language was mandatory, and that Congress could not have refused to create these courts without a violation of its duty.[2] But it is unnecessary to discuss this question, as power was, by the Constitution, conferred on Congress for this purpose, and it has provided for the organization of a Supreme Court and of inferior courts.

The importance of limiting the court of final resort to one Supreme Court will be obvious. If there were more than one, a diversity of decisions might and probably would occur; and this diversity, relating not only to general principles of the municipal law, but to the interpretation of statutes and the Constitution, would lead to doubts, distrust and disputes, and subject the administration of justice by the federal courts to reproach and disgrace.

The Constitution left Congress to provide for the organization and constitution of the federal courts. It prescribes the extent of the judicial power of the United States, and expressly provides in what cases the Supreme Court shall have original jurisdiction; giving it appellate jurisdiction in other cases.

§ 3. **Extent of judicial power.**—On the subject of the extent of judicial power the Constitution provides: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, citizens or subjects."[3]

[1] Const. art. 3, § 1.

[2] Martin *v.* Hunter, 1 Wh. 304; The Moses Taylor, 4 Wall. 411; 1 Kent Com. 318.

[3] Const. art. 3, § 2.

§ 4. **Amendment construing this section.**—It may be proper here to refer to a controversy that arose soon after the ratification of the Constitution in 1787, as to the proper construction of a clause of the foregoing section. The question presented was, whether a state could be sued in a federal court by a citizen of another state. Congress had provided for the organization of the Supreme Court and district and circuit courts, and given them, respectively, jurisdiction in certain cases. It had long been a maxim of the law that a sovereign power could not be sued in its own courts except by its consent. On the other hand a government in its corporate capacity may sue like an individual, and the various states of the Union have authority to sue in the state and federal courts. In the case of Chisholm *v.* Georgia,[1] the Supreme Court held that the Constitution gave that court jurisdiction of a suit brought against a state by a citizen of another state. This interpretation of the Constitution, however, excited much opposition and dissatisfaction, and led to the adoption of an amendment which prohibited the construction which it had received by the Supreme Court.

The amendment is as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."[2]

[1] 2 Dall. 419.

[2] Amend. Const. art. 11. In Chisholm *v.* Georgia, *supra*, Mr. Chief Justice Jay, who gave the opinion of the court in the case, in construing the constitutional provision, made a distinction between a suit against a state and one against the United States, holding that the former might be sued by a citizen of another state, but not the latter. He said: "In all cases of actions against states or individual citizens the national courts are supported in all their legal and constitutional proceedings and judgments by the arm of the executive powers of the United States. But in cases of actions against the United States there is no power which the courts can call to their aid. From this distinction important conclusions are deducible; and they place the case of a state and the case of the United States in a very different view."

Among the lucid expositions of the various provisions of the Constitution contemporary with the origin of that instrument contained in The Federalist we find some considerations of this subject in No. 81, now credited to Alexander Hamilton. He says: "It has been suggested that an assignment of public securities of one state to the citizens of another would enable them to prosecute that state in the federal courts for the amount of those securities—a suggestion which the following considerations prove to be without foundation. It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exception, as one of the attributes of sovereignty, is

Whatever may have been the true construction of this clause of the Constitution, it is now settled by this mandatory amendment.

§ 5. **Summary of reasons on which the judicial power rests.**—Before proceeding to the consideration of the organization and jurisdiction of the federal courts we will notice that brief summary of reasons on which each of the enumerated judicial powers of the Constitution rests, as set forth in the opinion of Mr. Chief Justice Jay in the case of Chisholm *v.* Georgia, *supra*. He said: "It may be asked what is the precise sense and latitude in which the words 'to establish justice,' as here used [in the preamble of the Constitution], are to be understood? The answer to this question will result from the provisions made in the Constitution on this head. They are specified in the second section of the third article, where it is ordained that the judicial power of the United States shall extend to ten descriptions of cases, namely: 1. To all cases arising under this Constitution; because the meaning, construction and operation of a compact ought always to be ascertained by all the parties, not

now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of state sovereignty were discussed in considering the article on taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from any constraint but that which flows from the obligations of good faith.

"The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will.

"To what purpose would it be to authorize suits against states for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting state; and to ascribe to the federal courts, by mere implication and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarranted."

It would appear from this that the opinion of the court in Chisholm *v.* Georgia differed from that of Mr. Hamilton at the time he was urging the adoption of the Constitution. It is evident that some of his conclusions were erroneous, as suggested by the question, "How could recoveries be enforced?" It might be replied, as we enforce judgments against ordinary municipal corporations, backed by the executive power of the United States. See Story on Const. § 1, 678.

In 1865 Congress constituted a Court of Claims, with jurisdiction to hear and determine all claims founded on any law of Congress, or upon any regulation of an executive department, or upon any contract express or implied with the government of the United States, and all claims which may be referred to it by either house of Congress, which may be suggested to it by petition filed therein. See Rev. Stat. ch. 21.

by authority derived from only one of them. 2. To all cases arising under the laws of the United States, because, as such laws, constitutionally made, are obligatory on each state, the measure of the obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties. 3. To all cases arising under treaties made by their authority; because, as treaties are compacts made by and obligatory on the whole nation, their operation ought not to be affected or regulated by local laws or courts of a part of the nation. 4. To all cases affecting ambassadors, or other public ministers and consuls; because, as these are officers of foreign nations, whom this nation are bound to protect and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority. 5. To all cases of admiralty and maritime jurisdiction; because, as the seas are the joint property of nations, whose rights and privileges relative thereto are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction. 6. To controversies to which the United States shall be a party; because, in cases in which the whole people are interested, it would not be equal or wise to let any one state decide and measure out justice due to others. 7. To controversies between two or more states; because domestic tranquillity requires that the contentions of states should be peaceably terminated by a common judicatory; and because in a free country justice ought not to depend on the will of either of the litigants. 8. To controversies between a state and citizens of another state; because, in case a state (that is, all the citizens of it) has demands against some citizens of another state, it is better that she should prosecute her demands in a national court than in a court of the state to which those citizens belong, the danger of irritations and criminations arising from apprehensions and suspicions of partiality being thereby obviated; because, in cases where some citizens of one state have demands against all the citizens of another state, the cause of liberty and the rights of men forbid that the latter should be the sole judges of the justice due the former; and true republican government requires that free and equal citizens should have free, fair and equal justice. 9. To controversies between citizens of the same state claiming lands under grants of different states: because, as the rights of the two states to grant the land are drawn

into question, neither of the two states ought to decide the controversy. 10. To controversies between a state, or the citizens thereof, and foreign states, citizens or subjects; because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations or people ought to be ascertained by, and depend on, national authority. Even this cursory view of the judicial powers of the United States leaves the mind strongly impressed with the importance of them to the preservation of the tranquillity, the equal sovereignty and the equal rights of the people."

The profound wisdom which dictated these provisions of the Constitution is manifest from this clear outline and condensed statement of the grounds on which they rest, and the experience of a century has fully confirmed the views of its earlier expounders.

§ 6. **Jurisdiction of the Supreme Court.**—The original as well as the appellate jurisdiction of the Supreme Court is fixed by the Constitution. It provides that in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.[1]

It is manifest that the Supreme Court cannot lawfully exercise original jurisdiction except in the enumerated cases, and that no act of Congress could give it any additional jurisdiction, or take from it any of the judicial powers conferred upon it by this provision of the Constitution.[2]

§ 7. **The original jurisdiction of the Supreme Court not exclusive.**—It has been a question of considerable controversy whether the grant of original jurisdiction to the Supreme Court in the specific cases mentioned in the Constitution was designed to make this jurisdiction exclusive; whether it should be construed to give it jurisdiction in such cases, exclusively of other federal courts which might be, and have since been, erected and organized under acts of Congress, in pursuance of the authority given by the Constitution

[1] Art. 3, sec. 2, Const. U. S.

[2] Marbury *v.* Madison, 1 Cr. 137; (1801) Wiscart *v.* Dauchy, 3 Dall. 321; 1 Kent. Com., sec. 15, p. 314, *et seq.*; *Ex parte* Vallandingham, 1 Wall. 248; *Ex parte* Yerger, 8 Wall. 85; The Alicia, 7 Wall. 571; Kentucky *v.* Dennison, 24 How. 66.

for this purpose. This question has never been authoritatively settled by the Supreme Court; for, although in the case of United States *v.* Ravara,[1] commenced in the circuit court for the district of Pennsylvania, it was held that Congress could give other federal courts concurrent jurisdiction in such cases, the opinion of the Supreme Court in the subsequent case of Marbury *v.* Madison[2] would appear to be in conflict with this doctrine; and in the still later case of United States *v.* Ortega,[3] the question was involved in the record, but the court did not find it necessary to decide it.

It has, however, been maintained by jurists of great eminence and ability that it is not essential to construe this provision of the Constitution as giving the Supreme Court exclusive original jurisdiction in the cases specified, and that there is nothing in it inconsistent with the power of Congress to create inferior courts, and confer upon them original jurisdiction concurrent with the Supreme Court, in the same specific cases; and this construction was ably maintained by Mr. Justice Nelson, in Graham *v.* Stucken.[4]

The judicial powers of the United States, as we have seen, were vested in the Supreme Court, and in such inferior courts as Congress should establish. When inferior courts were first organized and established, as they were by the Judiciary Act of 1789, Congress gave the circuit and district courts jurisdiction of certain causes of which the Supreme Court also had jurisdiction, by virtue of the provisions of the Constitution. The provisions of this act have remained unchanged in this respect, and were incorporated into the Revised Statutes.[5]

This practical contemporaneous exposition and legislative interpretation of the Constitution by Congress, some of whose members were especially interested in framing the Judiciary Act and had been members of the convention that framed the Constitution, and the long acquiescence in and tacit recognition of this interpretation by the courts, both state and federal, and by Congress, is certainly quite satisfactory if not conclusive on this question. In support of this view, Mr. Justice Nelson, in Graham *v.* Stucken, *supra*, says: "The last clause of section 2, article 3, of the Con-

[1] 2 Dall. 297.
[2] 1 Cr. 137.
[3] 11 Wh. 467.
[4] 4 Blatch. 50. See also St. Luke's Hospital *v.* Barclay, 3 Id. 259; Story on Constitution, § 1705; 1 Kent Com. 315.
[5] Stat. at L. 78; Rev. Stat. §§ 629, 687; act March 3, 1875, ch. 137, 18 Stat. 470.

stitution declares that in all cases affecting ambassadors, and other public ministers and consuls, and in those in which a state shall be a party, the Supreme Court shall have original jurisdiction. Congress, in distributing and regulating this grant of jurisdiction, provided, in section 13 of the Judiciary Act, that the Supreme Court should have exclusive jurisdiction in all cases against ambassadors, etc.; and original, but not exclusive, jurisdiction in all cases 'in which a consul or vice-consul shall be a party,' thus clearly rejecting the idea that the grant in the Constitution in respect to consuls was exclusively to the Supreme Court."

I apprehend that it may be safely affirmed that Congress has the power to confer on any or all of the inferior courts of the United States, which she has constituted or may hereafter constitute, original jurisdiction in any or all of the class of cases in which the Constitution has also conferred original jurisdiction on the Supreme Court.

CHAPTER II.

CONSTITUTION AND ORGANIZATION OF FEDERAL COURTS.

§ 8. **Duty of Congress to provide for.**—The Constitution vested the judicial power of the United States in one Supreme Court and such inferior courts as Congress might from time to time constitute. It was further provided by the Constitution that the President "shall nominate and, by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court;"[1] and that "the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office."[2]

It was the manifest duty of Congress, under the circumstances, to provide for the organization of a Supreme Court and inferior courts of the United States.

In pursuance of this plain duty Congress did, by the act of September 24, 1789, divide the United States into judicial districts and provide for the organization of the Supreme Court and district and circuit courts, and their jurisdiction, the number of justices of the Supreme Court, their precedence and salaries, and the appointment of clerks and marshals. Some changes have necessarily been made in this organic act, but its provisions remain substantially the same in the Revised Statutes, which, with the amendments thereof, divide the United States into districts as follows:

§ 9. **Provisions of the statutes creating judicial districts.**

JUDICIAL DISTRICTS.—*Sec.* 530. The United States shall be divided into judicial districts as follows:

STATES CONSTITUTING ONE DISTRICT.—*Sec.* 531 (as amended by act of June 26, 1876, 19 Stat. 61). The states of California, Colorado, Connecticut, Delaware, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Oregon, Rhode Island, Vermont and West Virginia, each, constitute one judicial district.

[1] Const. art. 2, § 2.

[2] Const. art. 3, § 1.

ALABAMA.—*Sec.* 532. The state of Alabama is divided into three districts, which shall be called the southern, middle and northern districts of Alabama. The southern district includes the counties of Mobile, Washington, Baldwin, Sumpter, Clarke, Marengo, Greene, Pickens, Wilcox, Monroe and Conecuh. The middle district includes the counties of Montgomery, Autauga, Coosa, Tallapoosa, Chambers, Talladega, Randolph, Macon, Russell, Barbour, Pike, Henry, Dale, Coffee, Covington, Lowndes, Dallas, Perry, Bibb, Shelby, Butler and Tuscaloosa. The northern district includes the remaining counties of said state.

ARKANSAS.—*Sec.* 533 (as amended by act of January 31, 1877, 19 Stat. 230). That the state of Arkansas is divided into two districts, which shall be called the eastern and western districts of Arkansas. The western district includes the counties of Benton, Washington, Crawford, Sebastian, Scott, Polk, Sevier, Little River, Howard, Montgomery, Yell, Logan, Franklin, Johnson, Madison, Newton, Carroll, Boone and Marion, and the country lying west of Missouri and Arkansas known as the Indian Territory. The eastern district includes the residue of said state.

COLORADO.—The act of June 26, 1876, ch. 147, § 1, 19 Stat. 61, provides: That the state of Colorado shall constitute one judicial district, to be called the district of Colorado. . . .

FLORIDA.—*Sec.* 534 (as amended by act of February 3, 1879, ch. 43, § 1, 10 Stat. 280). The state of Florida is divided into two judicial districts, which shall be called the northern and southern districts of Florida. The southern judicial district of the state of Florida shall embrace the counties of Hernando, Hillsborough, Polk, Manatee and Monroe, in said state; and all the territory within the remaining counties shall constitute the northern judicial district.

GEORGIA.—*Sec.* 535 (as amended by act of January 29, 1880, ch. 17, § 1, 21 Stat. 62). The state of Georgia is divided into two districts, which shall be called the northern and southern districts of Georgia. The northern district includes the counties of Troup, Meriwether, Morgan, Green, Taliaferro, Wilkes and Lincoln, as they existed August 11, 1848, with all the counties north of them. The southern district includes the counties of Harris, Talbot, Upson, Monroe, Jones, Putnam, Hancock, Warren and Columbia, Pike, Butts and Jasper, as they existed at said date, with all the counties south of them.

The act of January 29, 1880, ch. 17, § 2, 21 Stat. 63, provides: The said southern district of Georgia shall be divided into two divisions, to be known as the eastern and western divisions of the southern district of Georgia. The western division shall consist of forty-three counties, to wit: Bibb, Monroe, Jones, Twiggs, Houston, Crawford, Baldwin, Wilkinson, Laurens, Pulaski, Dooly, Macon, Taylor, Upson, Pike, Butts, Jasper, Putnam, Hancock, Warren, Dodge, Wilcox, Telfair, Sumpter, Schley, Marion, Talbot, Harris, Muscogee, Chattahoochee, Stewart, Webster, Lee, Terrell, Randolph, Quitman, Clay, Calhoun, Dougherty, Baker, Early, Miller and Mitchell. The eastern division shall consist of the remaining counties in said district. No additional clerk or marshal shall be appointed in said district.

Illinois.—*Sec.* 536. The state of Illinois is divided into two districts, which shall be called the northern and southern districts of Illinois. The northern district includes the counties of Henderson, Warren, Knox, Peoria, Woodford, Livingston and Iroquois, as they existed February 13, 1855, with all the counties north of them. The southern district includes the residue of said state.

Iowa.—*Sec.* 537 (abrogated and substituted by the provisions of the act of Congress of July 20, 1882, ch. 312, sections 1 and 2 of which provide as follows). That the state of Iowa be and the same is hereby divided into two judicial districts, in manner following, to wit: the counties of Clinton, Jones, Linn, Benton, Black Hawk, Grundy, Hardin, Hamilton, Webster, Calhoun, Sac, Ida, Monona, and all the counties north of those named, shall constitute a new district, to be known as the northern district of Iowa. The remaining counties of the state shall constitute the southern district of Iowa; and the present district court of Iowa, from and after the passage of this act, shall be known as the district court for the southern district of Iowa.

Sec. 2. That the present judge of the district of Iowa is hereby declared to be the district judge for the southern district of Iowa; that the President of the United States be and is hereby authorized and directed, by and with the advice and consent of the Senate, to appoint a district judge for the northern district of Iowa.

Michigan.—*Sec.* 538. The state of Michigan is divided into two districts, which shall be called the eastern and western districts of Michigan. The western district includes the territory and

waters within the following boundaries, as they existed February 24, 1863, namely: commencing at the southwest corner of Branch County, in said state, and running thence north, on the west line of Branch and Calhoun Counties, to the south line of Barry County; thence east, on the north line of Calhoun and Jackson Counties, to the southeast corner of Eaton County; thence north, on the east boundary of Eaton County, to the south line of Clinton County; thence west, on the south boundary of said county, to the southwest corner thereof; thence north, on the west boundary of Clinton and Gratiot Counties, to the south boundary of Isabella County; thence west, on its south boundary, to the southwest corner of said last-named county; thence north, on the west line of Isabella and Clare Counties, to the south boundary of Missaukee County; thence east, on its south boundary, to the southeast corner of Missaukee County; thence north, on the east line of Missaukee, Kalcasca and Antrim Counties, to the south boundary of Emmett County; thence east, to the southeast corner of Emmett County; thence north, on the east boundary of Emmett County, to the Straits of Mackinac; thence north, to midway across said straits; thence westerly, in a direct line, to a point on the shore of Lake Michigan where the north boundary of Delta County reaches Lake Michigan; thence west, on the north line of Delta County, to the northwest corner of said Delta County; thence south, on the west boundary of said county, to the dividing-line between the states of Michigan and Wisconsin, in Green Bay; thence northeasterly, on said dividing-line, into Lake Michigan; and thence southerly, through Lake Michigan, to the southwest corner of the state of Michigan, on a line that will include within said boundaries the waters of Lake Michigan within the admiralty jurisdiction of the state of Michigan; thence east, on the south boundary of the state of Michigan, to the intersection of the west line of Hillsdale County. The eastern district includes all the territory and waters of said state not included within the foregoing boundaries.

The act of June 19, 1878, ch. 326, § 1, 20 Stat. 175, provides: That the counties of Chippewa, Schoolcraft, Marquette, Houghton, Keweenaw, Ontonagon, Isle Royale, Baraga, and Mackinaw, being and including all that portion of the territory and waters of said eastern district lying in the upper peninsula of Michigan, be and

the same are hereby detached from the eastern judicial district of Michigan and attached to the western judicial district of said state.

The act of June 19, 1878, ch. 326, § 2, 20 Stat. 175, provides: That for the trial and determination of all causes and proceedings cognizable and triable in the circuit and district courts of the United States for the western district of Michigan as bounded and described in this act, the said district shall consist of two divisions known respectively as the southern and northern divisions of said district. The southern division shall comprise all that portion of said district lying and being in the lower peninsula of said state, and the northern division of said district shall comprise all the territory and waters of the entire upper peninsula of said state; and there shall be two regular terms of the circuit and district courts begun and held in each of the divisions of said western district annually.

MISSISSIPPI.—*Sec.* 539. The state of Mississippi is divided into two districts, which shall be called the northern and southern districts of Mississippi. The northern district includes the counties of Noxubee, Winston, Attala, Carroll, Bolivar, Coahoma, Tunica, De Soto, Marshall, Tippah, Tishemingo, Itawamba, Monroe, Lowndes, Oktibbeha, Choctaw, Yalabusha, Tallahatchee, Panola, La Fayette, Pontotoc and Chickasaw, as they existed June 18, 1838. The southern district includes the residue of said state.

MISSOURI.—*Sec.* 540 (as amended by act of April 8, 1878, ch. 51, 20 Stat. 35). The state of Missouri is divided into two districts, which shall be called the eastern and western districts of Missouri. The eastern district includes the counties of Schuyler, Adair, Knox, Shelby, Monroe, Pike, Montgomery, Gasconade, Franklin, Washington, Reynolds, Shannon and Oregon, as they existed January 1, 1857, with all the counties east of them. The western district includes the residue of said state.

The act of January 21, 1879, ch. 20, § 1, 20 Stat. 263, provides: The western district of Missouri is hereby divided into two divisions, which shall be known as the eastern and western divisions of the western district of Missouri. The western division shall include the counties of Andrew, Atchison, Barton, Bates, Buchanan, Caldwell, Carroll, Cass, Chariton, Clay, Clinton, Daviess, De Kalb, Gentry, Grundy, Harrison, Holt, Jackson, Jasper, La Fayette, Linn, Livingstone, Mercer, Nodaway, Platte, Putnam, Ray, Saline,

Sullivan, Vernon and Worth; and a term of the district court and circuit court of the United States for said district shall be held therein at the city of Kansas on the third Monday in May and the third Monday in October of each year. The remaining counties embraced in said district shall constitute the eastern division thereof, and the terms of the district and circuit courts of the United States for said district shall be held therein at the times and place now prescribed by law.

NEW YORK.—*Sec.* 541 (as amended by act of February 18, 1875, ch. 80, 18 Stat. 316). The state of New York is divided into three districts, which shall be called the northern, eastern and southern districts of New York. The northern district includes the counties of Rensselaer, Albany, Schoharie and Delaware, with all the counties north and west of them. The eastern district includes the counties of Richmond, Kings, Queens and Suffolk, with the waters thereof. The southern district includes the residue of said state, with the waters thereof.

Sec. 542. The district courts of the southern and eastern districts of New York shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens and Suffolk, and over all seizures made and all matters done in such waters; and all processes or orders issued out of either of said courts, or by any judge thereof, shall run and be executed in any part of the said waters.

NORTH CAROLINA.—*Sec.* 543. The state of North Carolina is divided into two districts, which shall be called the eastern and western districts of North Carolina. The western district includes the counties of Mecklenburg, Cabarras, Stanly, Montgomery, Richmond, Davie, Davidson, Randolph, Guilford, Rockingham, Stokes, Forsyth, Union, Anson, Caswell, Person, Alamance, Orange, Chatham, Moore, Clay, Cherokee, Swain, Macon, Jackson, Graham, Haywood, Transylvania, Henderson, Buncombe, Madison, Yancey, Mitchell, Watauga, Ashe, Alleghany, Caldwell, Burke, McDowell, Rutherford, Polk, Cleveland, Gaston, Lincoln, Catawba, Alexander, Wilkes, Surry, Iredell, Yadkin and Rowan, and all territory embraced therein which may hereafter be erected into new counties. The eastern district includes the residue of said state.

OHIO.—*Sec.* 544 (as amended by act of February 4, 1880, ch. 18, § 1, 21 Stat. 63). The state of Ohio is divided into two districts,

which shall be called the northern and southern districts of Ohio. The southern district includes the counties of Belmont, Guernsey, Muskingum, Licking, Franklin, Madison, Champaign, Shelby and Mercer, Union, Delaware, Morrow, Knox, Coshocton, Harrison and Jefferson, as they existed February 10, 1855, with all the counties south of them. The northern district includes the residue of said state.

The act of June 8, 1878, ch. 169, § 2, 20 Stat. 102, provides: Said northern district (of Ohio) shall be, and hereby is, divided into two divisions, to be known as the eastern and western divisions of the northern district of Ohio. The western division shall consist of twenty-four counties, to wit: Williams, Defiance, Paulding, Van Wert, Mercer, Auglaize, Allen, Putnam, Henry, Fulton, Lucas, Wood, Hancock, Hardin, Logan, Union, Delaware, Marion, Wyandot, Seneca, Sandusky, Ottawa, Erie and Huron; and the eastern division shall consist of the remaining counties in said district. But no additional clerk or marshal shall be appointed in said district.

The act of February 4, 1880, ch. 18, § 3, 21 Stat. 64, provides: Said southern district (of Ohio) shall be, and hereby is, divided into two divisions, to be known as the eastern and western divisions of the southern district of Ohio. The eastern division shall consist of twenty-nine counties, to wit: Union, Delaware, Morrow, Knox, Coshocton, Harrison, Jefferson, Madison, Fayette, Franklin, Pickaway, Ross, Pike, Gallia, Jackson, Meigs, Vinton, Athens, Hocking, Fairfield, Licking, Perry, Muskingum, Morgan, Washington, Noble, Monroe, Belmont and Guernsey; and the western division shall consist of the remaining counties in said district. But no additional clerk or marshal shall be appointed in said district.

PENNSYLVANIA.—*Sec.* 545. The state of Pennsylvania is divided into two districts, which shall be called the eastern and western districts of Pennsylvania. The western district includes the counties of Fayette, Greene, Washington, Allegheny, Westmoreland, Somerset, Bedford, Huntingdon, Centre, Mifflin, Clearfield, McKean, Potter, Jefferson, Cambria, Indiana, Armstrong, Butler, Beaver, Mercer, Crawford, Venango, Erie, Warren, Susquehanna, Bradford, Tioga, Union, Northumberland, Columbia, Luzerne and Lycoming, as they existed April 20, 1818. The eastern district includes the residue of said state.

SOUTH CAROLINA.—*Sec.* 546. The state of South Carolina is divided into two districts, which shall be called the eastern and western districts of the district of South Carolina. The western district includes the counties of Lancaster, Chester, York, Union, Spartansburgh, Greenville, Pendleton, Abbeville, Edgefield, Newberry, Laurens and Fairfield, as they existed February 21, 1823. The eastern district includes the residue of said state.

TENNESSEE.—*Sec.* 547 (as amended by the act of June 11, 1880, ch. 203, § 1, 21 Stat. 175, and the act of March 3, 1875, 18 Stat. 480). The state of Tennessee is divided into three districts, which shall be called the eastern, western and middle districts of Tennessee. The eastern district includes the counties of Anderson, Bledsoe, Blount, Bradley, Campbell, Carter, Claiborne, Cocke, Cumberland, Grainger, Greene, Hamilton, Hancock, Hawkins, Jefferson, Johnson, Knox, McMinn, Marion, Meigs, Monroe, Morgan, Polk, Rhea, Roane, Scott, Sevier, Sullivan, Union, and Washington, Grundy, as they existed February 19, 1856. The western district includes the counties of Benton, Carroll, Henry, Obion, Dyer, Gibson, Lauderdale, Haywood, Tipton, Shelby, Fayette, Hardeman, McNairy, Hardin, Madison, Henderson and Weakley, as they existed June 18, 1838. The middle district includes the residue of said state.

The act of June 11, 1880, ch. 203, § 3, 21 Stat. 175, provides: Said eastern district (of Tennessee) shall be and hereby is divided into two divisions, to be known as the northern and southern divisions of the eastern district of Tennessee. The southern division shall consist of the following counties, to wit: Hamilton, James, Polk, McMinn, Bradley, Meigs, Rhea, Marion, Sequatchie, Bledsoe, Grundy and Cumberland, and the northern division shall consist of the remaining counties in said district. But no additional clerk or marshal shall be appointed in said district.

The act of June 20, 1878, ch. 359, § 1, 20 Stat. 235, provides: The western district of Tennessee is hereby divided into two divisions, which shall be known as the eastern and western divisions thereof. The eastern division shall include the counties of Benton, Carroll, Decatur, Gibson, Henderson, Henry, Madison, McNairy, Hardin, Dyer, Lake, Crockett, Weakley and Obion, and terms of the circuit and district courts of the United States for said district shall be held therein at the town of Jackson, in the

county of Madison, at least twice in each year at such times as the judges thereof shall respectively fix, whenever the authorities of said county or town shall provide suitable buildings therefor free of any expense to the United States. The remaining counties embraced in said district shall constitute the western division thereof, and terms of the district and circuit courts of the United States for said district shall be held therein at the times and place now prescribed by law.

TEXAS.—*Sec.* 548 (as amended and substituted by act of February 24, 1879, ch. 97, §§ 1, 2, 3, 20 Stat. 318, and by the act of June 11, 1879, ch. 18, § 1, 21 Stat. 10; and by the act of June 14, 1880, ch. 213, § 2, 21 Stat. 198) provides: That a judicial district is hereby created in the state of Texas, to be called the northern judicial district of said state, and the territory embraced in the following named counties, as now constituted, shall compose said district, namely: Brazos, Robertson, Leon, Limestone, Freestone, Navarro, Ellis, Kaufman, Dallas, Rockwall, Hunt, Fannin, Lamar, Delta, Collins, Grayson, Cooke, Denton, Tarrant, Johnson, Hill, McLennan, Falls, Bell, Coryell, Hamilton, Bosque, Comanche, Erath, Somerville, Hood, Parker, Palo Pinto, Jack, Wise, Montague, Clay, Archer, Wichita, Wilbarger, Hardeman, Knox, Baylor, Haskell, Throckmorton, Young, Stephens, Shackelford, Jones, Taylor, Callahan, Eastland, Brown, Coleman, Runnells, Greer, Nolan, Fisher, Stonewall, King, Cottle, Childress, Collingsworth, Wheeler, Hemphill, Lipscomb, Ochiltree, Roberts, Gray, Donley, Hall, Motley, Dickens, Kent, Scurry, Mitchell, Howard, Borden, Dawson, Gaines, Martin, Andrews, Garza, Crosby, Floyd, Briscoe, Armstrong, Carson, Hutchinson, Hansford, Sherman, Moore, Potter, Randall, Swisher, Hale, Lubbock, Lynn, Terry, Hockley, Lamb, Castro, Deaf Smith, Oldham, Hartley, Dallam, Palmer, Bailey, Cochran and Yoakum.

That the territory embraced in the following named counties, as now constituted, shall compose the eastern judicial district, namely: Jackson, Matagorda, Wharton, Brazoria, Fort Bend, Colorado, Austin, Waller, Harris, Galveston, Chambers, Jefferson, Orange, Hardin, Liberty, Newton, Jasper, Tyler, Polk, San Jacinto, Montgomery, Walker, Grimes, Madison, Trinity, Angelina, San Augustine, Sabine, Shelby, Nacogdoches, Cherokee, Houston, Anderson, Henderson, Smith, Rusk, Panola, Harrison, Gregg, Up-

shur, Wood, Vanzandt, Rains, Hopkins, Camp, Titus, Marion, Cass, Bowie, Franklin, Morris and Red River.

That the territory embraced in the following named counties, as now constituted, shall compose the western judicial district of said state, namely, Calhoun, Victoria, Goliad, Refugio, Bee, San Patricio, Nueces, Cameron, Hidalgo, Starr, Zapata, Duval, Encinal, Webb, La Salle, McMullin, Live Oak, De Witt, Lavaca, Gonzales, Wilson, Karnes, Atascosa, Frio, Dimmit, Zavala, Maverick, Dinney, Uvalde, Medina, Bexar, Guadalupe, Caldwell, Fayette, Washington, Lee, Burleson, Milan, Williamson, Bastrop, Travis, Hays, Comal, Kendall, Blanco, Burnett, Llano, Gillespie, Kerr, Bandera, Edwards, Kimball, Mason, Menard, El Paso, Presidio, Tom Green, Crockett, Pecos, Concho, McCulloch, San Saba and Lampasas, and Aransas.

VIRGINIA.—*Sec.* 549. The state of Virginia is divided into two districts, which shall be called the eastern and western districts of Virginia. The western district includes the counties of Albemarle, Alleghany, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetourt, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Cumberland, Floyd, Franklin, Frederick, Fluvanna, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Madison, Montgomery, Nelson, Patrick, Page, Pulaski, Pittsylvania, Rappahannock, Roanoke, Rockbridge, Rockingham, Russell, Scott, Smyth, Shenandoah, Tazewell, Washington, Wise, Wythe and Warren. The eastern district includes the residue of said state.

WISCONSIN.—*Sec.* 550. The state of Wisconsin is divided into two districts, which shall be called the eastern and western districts of Wisconsin. The western district includes the counties of Rock, Jefferson, Dane, Green, Grant, Columbia, Iowa, La Fayette, Sauk, Richland, Crawford, Vernon, La Crosse, Monroe, Adams, Juneau, Buffalo, Chippewa, Dunn, Clarke, Jackson, Eau Claire, Pepin, Marathon, Wood, Pierce, Polk, Portage, Saint Croix, Trempealeau, Douglas, Barron, Burnett, Ashland and Bayfield. The eastern district includes the residue of said state.

CHAPTER III.

ORGANIZATION OF DISTRICT COURTS.

§ 10. **Provisions of the statutes providing for the organization of district courts.**—The statutes providing for the constitution and organization of district courts are as follows:

DISTRICT JUDGES, APPOINTMENT AND RESIDENCE.—*Sec.* 551. A district judge shall be appointed for each district, except in the cases hereinafter provided. Every such judge shall reside in the district for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor.

COLORADO.—The act of June 26, 1876, ch. 147, § 1, 19 Stat. 61, provides: And for said district (of Colorado) a district judge, and a marshal, and a district attorney of the United States shall be appointed by the President, by and with the advice and consent of the Senate, with the same rights, powers and duties provided by law for similar officers in the other states, except as herein otherwise provided.

An act of June 26, 1876, ch. 147, § 2, 19 Stat. 61, provides: That the circuit and district courts for the district of Colorado, and the judges thereof, respectively, shall possess the same powers and jurisdiction, and perform the same duties possessed and required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations.

TEXAS.—An act of February 24, 1879, ch. 98, § 7, 20 Stat. 320, provides: That the present judge of the eastern district of Texas be and he is hereby assigned to hold said courts in the said eastern district, and shall exercise the same jurisdiction and perform the same duties within the said district as he now exercises and performs within his present district. That the present judge of the western district of Texas be and he is hereby assigned to hold said courts in the western district of Texas, and shall exercise the same jurisdiction and perform the same duties within the said district as he now exercises and performs within his present district. And there shall be appointed a district judge for the northern district of Texas, who shall possess the same powers and do and perform all such duties in his

district as are now enjoyed or in any manner appertain to the present district judges for said eastern and western districts of Texas. And the district judge of such district shall be entitled to the same compensation as by law is provided for the present judges of the eastern and western districts of Texas.

JUDGES IN VARIOUS STATES TO BE APPOINTED.—*Sec.* 552. There shall be appointed in each of the states of Alabama, Georgia, Mississippi, South Carolina and Tennessee, one district judge, who shall be district judge for each of the districts included in the state for which he is appointed, and shall reside within some one of the said districts. And for offending against this provision such judges shall be liable as in the preceding section.

An act of June 14, 1878, ch. 196, § 1, 20 Stat. 132, provides: That there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, a district judge for the western district of Tennessee, who shall from and after the time of his appointment hold the terms of the United States district court in said district at the times and places required by law.

An act of June 14, 1878, ch. 196, § 3, 20 Stat. 132, provides: The present district judge of said state (Tennessee) shall be and remain the district judge of the United States for the middle and eastern districts thereof, as if originally appointed thereto.

Sec. 553. The district judge for the southern district of Florida shall reside at Key West.

SALARIES OF DISTRICT JUDGES.—*Sec.* 554. District judges are entitled to receive yearly salaries at the following rates, payable quarterly from the treasury: the judge of the district of California, five thousand dollars; the judge of the district of Louisiana, four thousand five hundred dollars; the judges of the district of Massachusetts, the northern, southern and eastern districts of New York, the eastern and western districts of Pennsylvania, the district of New Jersey, the district of Maryland, the southern district of Ohio, and the northern district of Illinois, four thousand dollars. The judges of all other districts, three thousand five hundred dollars. No other allowance or payment shall be made to them for travel, expenses or otherwise. [See §§ 597, 613.]

The act of June 26, 1876, ch. 147, § 3, 19 Stat. 61, provides: That the district judge appointed for the district of Colorado shall

receive as his compensation the sum of three thousand five hundred dollars a year, payable in four equal installments on the first days of January, April, July and October of each year.

An act of June 14, 1878, ch. 196, § 2, 20 Stat. 132, provides: Said district judge (for the western district of Tennessee) shall be paid the same salary and in the same manner as the judge of the middle and eastern districts of Tennessee, and shall exercise all the circuit and district court power and jurisdiction now conferred on said judge and said court.

CLERKS.—*Sec.* 555. A clerk shall be appointed for each district court by the judge thereof, except in cases otherwise provided for by law.

An act of February 24, 1879, ch. 98, § 9, 20 Stat. 320, provides: The district judge of the northern district (of Texas) shall appoint a clerk of said court, who shall reside at one of the places designated in this act for holding the courts; and two deputies shall be appointed by the clerk, one of whom shall reside at each of the other places designated for holding the courts.

An act of June 26, 1876, § 4, 19 Stat. 62, provides: That the marshal, district attorney and clerk of the circuit and district courts of said district of Colorado, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States, and shall for the services they may perform receive the fees and compensation allowed to other similar officers and persons performing similar duties, by the laws of the United States, excepting such provisions thereof as are specially applicable to some particular officer or district.

ARKANSAS.—*Sec.* 556 (as amended by act of January 31, 1877, ch. 41, 19 Stat. 230). In the eastern district of Arkansas there shall be appointed two clerks of the district court thereof, one of whom shall reside and keep his office at Little Rock, and the other shall reside and keep his office at Helena.

KENTUCKY; CLERKS.—*Sec.* 557. In the district of Kentucky a clerk of the district court shall be appointed at each place of holding the court, in the same manner and subject to the same duties and responsibilities which are or may be provided concerning clerks in independent districts.

DEPUTY CLERKS.—*Sec.* 558. One or more deputies of any clerk of a district court may be appointed by the court, on the application of the clerk, and may be removed at the pleasure of judges authorized to make the appointment. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk, in his name, until a clerk is appointed and qualified; and for the default or misfeasances in office of any such deputy, whether in the life-time of the clerk or after his death, the clerk, and his estate, and the sureties in his official bond, shall be liable; and his executor or administrator shall have such remedy for any such default or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his life-time.

DEPUTY CLERKS IN INDIANA.—*Sec.* 559. In the district of Indiana the clerk of the district court must appoint a deputy clerk for said court held at New Albany, and a deputy clerk for said court held at Evansville, who shall reside and keep their offices at said places respectively. Each deputy shall keep in his office full records of all actions and proceedings in the district court held at the same place, and shall have the same power to issue all process from the said court that is or may be given to the clerks of other district courts in like cases.

An act of March 3, 1879, ch. 182, § 2, 20 Stat. 399, provides: That the clerk of the district court and the clerk of the circuit court for the district of Indiana, and the marshal and the district attorney for said district, shall perform the duties appertaining to their offices respectively for said courts; and the clerks of said courts and the marshal shall appoint deputies to reside and keep their offices at Fort Wayne, and who shall, in the absence of their principals, do and perform all the duties appertaining to their said offices respectively.

DISTRICT OF IOWA.—*Sec.* 560 (as amended by act of July 20, 1882). There shall be appointed by the judge of the northern district of Iowa, with the approval of the circuit judge of the eighth judicial circuit, a clerk for the district and circuit courts in and for the northern district of Iowa. The persons now acting as clerks for the district of Iowa shall be the clerks for the southern district of Iowa.

DISTRICT OF KANSAS; CLERKS, MARSHALS AND DISTRICT ATTORNEY.—An act of March 3, 1879, ch. 177, § 2, 20 Stat. 355,

provides: That the clerk of the district court for the district of Kansas, the marshal and district attorney for said district, shall perform the duties pertaining to their offices respectively for said courts; and said clerk and marshal shall appoint a deputy to reside and keep their offices at Fort Scott, and who shall, in the absence of their principals, do and perform all the duties appertaining to their said offices respectively.

Clerk of the western district of Michigan; deputy.—The act of June 19, 1878, ch. 326, § 4, 20 Stat. 176, provides: The clerk of the circuit and district courts for the western district of Michigan shall reside and keep his office at Grand Rapids, and shall also appoint a deputy clerk for said courts held at Marquette, who shall reside and keep his office at that place; and said deputy clerk shall keep in his office full records of all actions and proceedings in the said circuit and district courts for the northern division of said district, held at that place, and shall have the same power to issue all processes from the said courts, and perform any other duty that is or may be given to the clerks of other circuit and district courts in like cases.

Clerks in western district of Missouri.—An act of January 21, 1879, ch. 20, § 4, 20 Stat. 263, provides: The clerks of the circuit and district courts for said district (western district of Missouri) shall each appoint a deputy clerk at the place where their respective courts are required to be held in the division of the district in which such clerk shall not himself reside, each of whom shall, in the absence of the clerk, exercise all the powers and perform all the duties of clerk within the division for which he shall be appointed; *provided*, that the appointment of such deputies shall be approved by the court for which they shall be respectively appointed, and may be annulled by such court at its pleasure; and the clerk shall be responsible for the official acts and neglects of all such deputies.

Clerks in western district of Tennessee.—An act of June 20, 1878, ch. 359, § 1, 20 Stat. 236, provides: The clerks of the circuit and district courts for said district (western district of Tennessee) shall each appoint a deputy of their respective courts at the place in the eastern division of said district where their said courts are required to be held, who shall, in the absence of the clerk, exercise all the powers and perform all the duties of clerk

within said division; *provided*, that the appointments of such deputies shall be approved by the court for which they shall be respectively appointed, and may be annulled by such court at its pleasure. The marshal of said district shall also appoint a deputy for said eastern division, who shall reside therein, and in the absence of the marshal perform all the duties devolved upon the marshal by law.

COMPENSATION OF DEPUTY CLERKS.—*Sec.* 561. The compensation of deputies of the clerks of the district courts shall be paid by the clerks, respectively, and allowed in the same manner that other expenses of the clerks' offices are paid and allowed.

RECORDS, WHERE KEPT.—*Sec.* 562. The records of a district court shall be kept at the place where the court is held. When it is held at more than one place in any district, and the place of keeping the records is not specially provided by law, they shall be kept at either of the places of holding the court which may be designated by the district judge.

§ 11. **Salary of judges.**—The Constitution provides that the judges shall hold their offices during good behavior, and that they shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.[1] And the statutes provide that when any judge of any court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of seventy years, he shall during the residue of his natural life receive the same salary which was by law payable to him at the time of his resignation.[2]

§ 12. **Judges prohibited from practicing law.**—Another wise provision of the statutes prohibits any federal judge from exercising the profession or employment of counsel or attorney, or engaging in the practice of the law, making the offender guilty of a high misdemeanor.[3]

§ 13. **Appointment of clerks; official bonds.**—The judges of the several districts have the power, and it is their duty, to appoint a clerk in each district, except where otherwise provided by statute;[4] and the statute provides that in some districts they may appoint more than one.[5] He is required to take an oath for the faithful perform-

[1] Const. art. 3. § 1.
[2] Rev. Stat. § 714.
[3] Rev. Stat. § 713.
[4] Rev. Stat. § 555.
[5] Rev. Stat. §§ 556, 557.

ance of his duty,[1] and also to give an official bond, in a sum to be fixed by the judge who appoints him, for the faithful discharge of the duties of the office; and a new bond may be required whenever the court deems it proper for a new one to be given. It is further required that such bonds be entered upon the journal of the court for which he is appointed, and deposited for safe keeping in such place as the court may direct; and a certified copy of such entry on the journal is made *prima facie* proof of the execution of such bond and of the contents thereof.[2]

§ 14. **Duties of clerks.**—Besides various minor and special duties required to be performed by the clerk, his general duties more particularly demand that he faithfully enter and record all the orders, decrees, judgments and proceedings of the court; and the official oath required of him provides that he will faithfully perform this duty as well as impartially discharge and perform all the duties of his office according to the best of his ability and understanding.[3]

§ 15. **Compensation of clerks.**—Section 828 of the Revised Statutes provides in detail for fees to be charged by the clerk for the various services he is required to perform;[4] and section 833 requires him semi-annually to make a written return to the Attorney-General, for the preceding half year, of all the fees and emoluments of his office, and of all the expenses of the office, including necessary clerk-hire, together with the vouchers for the payment of the same for such last half year, which return must be verified by oath.[5] But no clerk of a district or circuit court shall be allowed by the Attorney-General to retain of the fees and emoluments of his office, for his personal compensation, a sum exceeding three thousand five hundred dollars a year, or at that rate for a shorter length of time, unless both clerkships are held by the same person,[6] except in California, Oregon and Nevada, where they are allowed to charge double the ordinary fees allowed clerks, and they are allowed to retain of the fees received by them for their personal services an amount not exceeding seven thousand dollars a year, or at that rate for a shorter time;[7] and the allowance for personal compensation of clerks for each year must be made from the fees and emoluments of that year;[8] but in prize causes they may retain for official serv-

[1] Rev. Stat. § 794.
[2] Rev. Stat. § 795.
[3] Rev. Stat. § 794.
[4] Rev. Stat. § 834.
[5] Rev. Stat. § 839.
[6] See *post*, § 578; Rev. Stat. § 839.
[7] Rev. Stat. § 840.
[8] Rev. Stat. § 843.

ices an additional compensation not exceeding in amount one-half of the maximum compensation allowed them as aforesaid.[1] It is made the duty of the clerk, at the time of making his semi-annual return, to pay into the treasury of the United States, or deposit to the credit of the Treasurer, as may be directed by the Attorney-General, any surplus of the fees and emoluments of his office which the return shows to exist over and above the compensation allowed as aforesaid, except for the necessary expenses of his office, including necessary clerk-hire, to be audited and allowed by the proper accounting officers of the treasury.[2] It is further required that the accounts of the clerk shall be examined and certified by the district judge of the district for which they are appointed, before they are presented to the accounting officers of the Treasury Department for settlement.[3]

§ 16. **Commissions for receiving and paying out money.**—The clerk, under the provisions of the statutes, is entitled to a commission for receiving, keeping and paying out moneys obtained by fines, penalties or forfeitures under the revenue laws.[4] But he is not entitled to a commission on money received by a commissioner and paid out by him in proceedings in bankruptcy.[5]

§ 17. **Appointment of deputy clerks.**—Under the provisions of section 558 of the Revised Statutes, providing for the appointment of deputy clerks by the court, it has been held that a deputy thus appointed may do any act which the clerk is authorized by law to do. He may sign a warrant, citation or monition, and do every act which the principal may do.[6]

§ 18. **Official bond of deputy clerks.**—Any circuit or district court may require any deputy clerk thereof to give a bond to the United States for the faithful discharge of his duty as such deputy, in the same penalty, and with surety in the same manner, as is required by law of clerks; and it is required that such bond be recorded and preserved in like manner. The taking of this bond, however, does not affect the legal responsibility of the clerk also for the official acts of the deputy.[7]

[1] Rev. Stat. § 842.
[2] Rev. Stat. §§ 833, 839, 844.
[3] Rev. Stat. § 846; also Amendment, February 18, 1875.
[4] *In re* Goodrich, 4 Dill. 230; Upton *v.* Triblecock, 4 Dill. 232.
[5] United States *v.* One Horse, 7 Ben. 405. See also The Avery, 2 Gallis. 308.
[6] The Confiscation Cases, 20 Wall. 92; Bragg *v.* Lorio, 1 Woods 209.
[7] Rev. Stat. § 796.

§ 19. **Marshals and their deputies.**—It is essential to the proper discharge of the functions of courts that they have some executive officer for the service of process and the execution of their judgments. For this purpose it is provided by statute that "a marshal shall be appointed in each district, except in the middle district of Alabama, and the northern district of Georgia, and the western district of South Carolina;" and that he shall hold his office for the term of four years.[1] The marshal of the southern district of Alabama is required to perform the duties of marshal in the middle district of said state, and to keep an office at Montgomery, in the middle district. The marshal of the southern district of Georgia is required to perform the duties of marshal in the northern district of that state, and to keep an office at Marietta, in said district; and the marshal of the eastern district of South Carolina is required to perform the duties of marshal in the western district of that state;[2] and the marshal of the district of Iowa is required to perform all the duties of that officer in all the four divisions of the district.[3] And it is further provided that every marshal may appoint one or more deputies, who shall be removable from office by the judge of the district court, or by the circuit court of the district, at the pleasure of either.[4]

§ 20. **Official oaths of marshals and their deputies.**—It is the duty of every marshal and deputy marshal, before he enters upon the duties of the office, to take an oath to faithfully execute the duties of the office, the form of which, and the parties before whom it may be taken, being particularly pointed out in section 782 of the Revised Statutes.[5]

§ 21. **Marshals' fees and salaries.**—Section 829 of the Revised Statutes provides particularly for the fees for services rendered by marshals, and in addition thereto they are entitled to receive salaries for extra services in certain districts.

In the district of California the marshal is entitled, in addition to his fees, to a salary at the rate of five hundred dollars a year; in the district of North Carolina, at the rate of four hundred dollars a year; and the marshal of all other districts, at the rate of two hundred dollars a year, except in the southern and eastern dis-

[1] Rev. Stat. §§ 776, 779.
[2] Rev. Stat. §§ 776, 777.
[3] Rev. Stat. § 778.
[4] Rev. Stat. § 780.
[5] See *post*, ch. Fees of Officers.

tricts of New York, the eastern district of Pennsylvania, the southern district of Illinois, the western district of Missouri, the northern and southern districts of Georgia, and the districts of Massachusetts, Maryland and Nevada.[1]

§ 22. **Marshal's bond.**—Before any person can enter upon the duties of the office of marshal, he is required to give a bond in the sum of twenty thousand dollars, before the district judge of the district, with sufficient sureties, who must be inhabitants and freeholders of the district, and the bond must be approved by said judge, for the faithful performance of the duties of himself and his deputies. The bond is required to be filed in the office of the clerk of the district or circuit court sitting within the district, and copies thereof, certified by the clerk, are made competent evidence in any court of justice.[2]

If the bond is not approved by the district judge, it cannot be considered as accepted by the United States, as he alone has authority to accept it; and a bond with one surety is not such a bond as the law requires.[3]

§ 23. **Suits on marshal's bonds; costs.**—Any person injured by a breach of the condition of a marshal's bond may maintain an action thereon in his own name, and recover such damages as he may have sustained, and as shall be legally assessed, with costs; but if he fails to recover, execution may issue against him for costs in favor of the defendant. In no case, however, can the United States be made liable for costs.[4]

The proceedings against the marshal and his sureties must be by action in the usual way, and they cannot be proceeded against in a summary manner, as provided by state laws.[5]

§ 24. **Bond to remain after judgment; limitation of action on.**—The bond remains as a surety for any person injured by a breach of its conditions, after any judgment rendered thereon, until the whole penalty has been recovered, and the proceedings thereon should always be in the name of the party injured.[6] But no suit can be maintained on such bond unless it is commenced within six years

[1] Rev. Stat. § 781.
[2] Rev. Stat. § 783.
[3] Jackson *v.* Simonton, 4 Cr. C. C. 255.
[4] Rev. Stat. § 784.
[5] Gwin *v.* Breedlove, 2 How. 29; Gwin *v.* Barton, 6 How. 7. It may be in the name of the United States for the benefit of the party injured: U. S. *v.* Davidson, 1 Biss. 433.
[6] Rev. Stat. § 785.

after the right of action accrues, except in cases of infants, married women and insane persons, who may sue within three years after their disabilities are removed.[1]

§ 25. **Duties and powers of marshals.**—It is the duty of the marshal of each district to attend the district and circuit courts when sitting therein, and to execute, in the district, all lawful precepts directed to him and issued under the authority of the United States; and he has authority to command all necessary assistance in the execution of his duty. He and his deputies have the same powers in each state in executing the laws of the United States as sheriffs and their deputies have by law in executing the laws thereof.[2] It is the further duty of the marshal, within thirty days before the commencement of each term of the circuit or district court of his district, to make returns to the Solicitor of the Treasury of the proceedings had upon all writs of execution, or other process, which have been placed in his hands for the collection of moneys adjudged and decreed to the United States, in said courts respectively;[3] and if an execution upon a judgment in any suit for moneys due on account of the Post-Office Department shall be directed to him, he is required to make returns to the Sixth Auditor, of the proceedings which have taken place upon such process at such times as said auditor may direct.[4] Original process must be served by a marshal, and cannot be properly served by a private person.[5] But a subpœna may be served by a private person, for its mandate is to the witness and not to the marshal.[6]

§ 26. **Duty of the deputy in case of the death of the marshal.**—Section 789 of the Revised Statutes provides: "In case of the death of any marshal, his deputy or deputies shall continue in office unless otherwise specially removed, and shall execute the same in the name of the deceased, until another marshal is appointed, as provided in this chapter, and duly qualified. The defaults or misfeasances in office of such deputies in the meantime shall be adjudged a breach of the condition of the bond given by the marshal who appointed them; and the executor or administrator of the deceased marshal shall have like remedy for defaults and misfeas-

[1] Rev. Stat. § 786. For a construction of this section see United States *v.* Rand, 4 Saw. 272; Same *v.* Godbold, 3 Woods 550; Montgomery *v.* Hernandez, 18 Wheat. 120.

[2] Rev. Stat. §§ 787, 788.

[3] Rev. Stat. § 791.

[4] Rev. Stat. § 792.

[5] Schwabacker *v.* Reilly, 2 Dill. 127.

[6] Scott *v.* Allen, 6 Phila. 484; Russell *v.* Ashley, Hemp. 546; Scott *v.* Schwabacker *v.* Reilly, 2 Dill. 127.

ances in office of such deputies, during such interval, as he would be entitled to if the marshal had continued in life and in the exercise of his said office, until his successor was appointed and duly qualified."[1]

§ 27. **District attorneys; appointment.**—One of the most important officers of the court is the district attorney, who acts as the attorney for the government within the district for which he is appointed.

It is provided by statute that there shall be appointed in each district, except in the middle district of Alabama, and the northern district of Georgia, and the western district of South Carolina, a person learned in the law, to act as attorney in such district; that the district attorney in the northern district of Alabama shall perform the duties of district attorney of the middle district of that state; that the district attorney of the southern district of Georgia shall perform the duties of district attorney of the northern district of that state; and that the district attorney of the eastern district of South Carolina shall perform the duties of the office for the western district of that state.[2] The district attorney for the Iowa district is required to perform the duties of district attorney in all the divisions of said district.[3]

§ 28. **Duties of district attorney.**—It is the duty of this officer to prosecute in his district all delinquents, for crimes and offences cognizable under the laws and authority of the United States, and all civil actions in which the United States are concerned, and to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors or other officers of the revenue of the United States, for any act done by them, or for the recovery of any money exacted by or paid to such officers, and by them paid into the treasury of the United States, unless otherwise instructed by the Secretary of the Treasury.[4] He is further required, on instituting any suit for the recovery of any fine, penalty or forfeiture, to transmit, immediately, a statement thereof to the Solicitor of the Treasury;[5] and, immediately after the end of every term of the circuit and district courts for his district, to forward to the Solicitor of the Treasury a full and particular statement of all causes pend-

[1] See also Rev. Stat. 790. For further information on the subject reference may be had to chapter 14, Rev. Stat.

[2] Rev. Stat. § 767; amended act Feb. 24, 1879, ch. 97, § 8, 20 Stat. 320.

[3] Rev. Stat. § 768.

[4] Rev. Stat. § 771.

[5] Rev. Stat. § 772.

ing in said courts respectively, and of all causes decided therein during said term in which the United States are a party, which statement must be accompanied by the certificate of the clerks of said courts respectively;[1] provided, however, that if any suit or proceeding is commenced, under the internal revenue laws, to which the United States are a party, or any suit or proceeding is instituted against a collector or other officer of the internal revenue, wherein a district attorney appears, it is made the duty of the attorney of the district in which it is brought to report to the Commissioner of Internal Revenue the full particulars relating to the same, and, immediately after the end of each term of the said courts where such suit is pending, forward to said commissioner a full and particular statement of its condition.[2]

He is further required, on the first day of October in each year, to make a return to the Solicitor of the Treasury of the number of suits and proceedings commenced, pending and determined within his district within the fiscal year next preceding the date of such return, showing the date of the commencement of such suit or proceeding; and if the determination of the same has been delayed beyond the usual or a reasonable period, he must state the reasons therefor, and the measures taken by him to press such suits or proceedings to a close.[3]

He is also required, immediately after the end of a term in which any suit for moneys due on account of the Post-Office Department has been pending in his district, to forward to the Department of Justice a statement of any judgment or order made or steps taken in the same during such term, accompanied by a certificate of the clerk showing the parties to and the amount of every such judgment, with such other information as the Department of Justice may require. It is also his duty to direct speedy and effectual execution upon any judgment, and the marshal to whom it is directed must make return of his proceedings thereon to the same department at such times as it may direct.[4]

When any collector of customs or of internal revenue shall report to him, according to law, any case in which any fine, penalty or forfeiture has been incurred in his district for the violation of any law of the United States relating to the revenue, it is his duty to

[1] Rev. Stat. § 773.
[2] Rev. Stat. § 774.
[3] Rev. Stat. § 773.
[4] Rev. Stat. § 775.

cause the proper proceedings to be commenced and prosecuted without delay for the fines, penalties and forfeitures in such cases provided, unless he shall determine, upon an examination and inquiry, that the proceedings could not be sustained or that the ends of justice do not require it; in which case it is his duty to report the facts in customs cases to the Secretary of the Treasury, and in internal revenue cases to the Commissioner of Internal Revenue, for their direction.[1]

§ 29. **Duty to prosecute for crimes.**—As it is made the duty of the prosecuting attorney "to prosecute in his district all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States are concerned," it has been held that the federal courts could not properly take cognizance of a cause in the name of the United States unless it is prosecuted by the district attorney of the district;[2] and where the prosecution was for a contempt of court in which the United States was interested as plaintiff, it was held that the district attorney should appear as prosecutor.[3] But he has no power to dismiss a criminal charge under examination before a commissioner, although after indictment found and before the trial is commenced, it seems he has absolute power to enter a *nolle prosequi*.[4]

§ 30. **He is the recognized officer of the government.**—The federal courts will not recognize a suit, civil or criminal, as legally before them in the name of the United States, unless it be instituted and prosecuted by a district attorney duly appointed and commissioned for that purpose.[5] He is the officer of the government who has the proper charge of its legal proceedings within the district, subject only to the supervision of the Attorney-General. If other attorneys or counsel are employed by the government it is to aid him, and not as official representatives of the government.[6] And if the bill, declaration or other pleading on the part of the government does not show that the suit was instituted by the proper district attorney, it would be demurrable.[7] The court can only have

[1] Rev. Stat. § 838.

[2] United States *v.* McAvoy, 4 Blatch. 418; United States *v.* Doughty, 7 Id. 424; United States *v.* Blaisdell, 3 Ben. 132.

[3] Durant *v.* Washington Co., 1 Woolw. 377.

[4] United States *v.* Schumann, 2 Abb. U. S. 523.

[5] United States *v.* McAvoy, 4 Blatch. 418; United States *v.* Doughty, 7 Id. 424.

[6] The Pueblo Case, 4 Saw. 553.

[7] United States *v.* Doughty, 7 Blatch. 424.

communication with the executive officers of the government through the district attorney.[1]

It is made, as we have seen, the duty of the district attorney to prosecute in his district all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States are concerned; and it is his further duty to provide the marshal with the necessary process to carry into execution the judgments of the courts.[2] He should attend the sessions of the grand jury, to advise that body on questions of law that may be presented, to examine witnesses, and, when required by them, to draw indictments. But he has no right to control the action of a grand jury or prevent its consideration of any particular case before it, by representing or declaring that the government will not prosecute it.[3] Nor can he enter a *nolle prosequi* in a criminal case without the consent of the court.[4]

§ 31. **District attorney's fees and compensation.**—Chapter xvi. of the Revised Statutes provides for the fees and compensation of district attorneys, clerks, marshals, commissioners and other officers; and sections 823 and 824 of said chapter, what costs may be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States, which embraces district attorneys.[5]

Various sections of this chapter, as will be seen by a reference to it, provide for extra compensation for special and extraordinary services; but he is required semi-annually in each year, to wit, "on the first days of January and July, or within thirty days thereafter, to make to the Attorney-General, in such form as he may prescribe, a written return for the half year ending on said days respectively, of all fees and emoluments of his office of every name and character, and of all the necessary expenses of his office, including necessary clerk-hire, together with the vouchers for the payment of the same for such last half year." Said returns are required to be verified by the oath of the district attorney making the same.[6]

The return is required to embrace all fees, charges and emolu-

[1] United States *v.* Blaisdell, 3 Ben. 132.

[2] Levy Court *v.* Ringgold, 5 Pet. 451; s. c., 2 Cr. C. C. 659.

[3] United States *v.* Schumann, 2 Abb. C. C. 523.

[4] United States *v.* Corrie, 23 L. R. 145. But see United States *v.* Watson, 7 Blatch. 60; United States *v.* Schumann, 2 Abb. C. C. 523.

[5] See chapter xiii., *post.*

[6] Rev. Stat. § 833.

ments to which he may be entitled by reason of the discharge of the duties of his office,[1] except fees he may have received in suits or proceedings arising under the revenue laws of the United States, conducted by him, and in which the United States were a party, in which he is allowed two per centum upon the moneys collected,[2] and except such compensation as he may have received for official duty performed by direction of the Secretary or Solicitor of the Treasury, on behalf of any officer of the revenue in any suit against such officer, or for the recovery of any money received by him and paid into the treasury of the United States, in the performance of his official duty; in which case he is allowed such compensation as may be certified to be proper by the court in which the suit is brought, and approved by the Secretary of the Treasury.[3]

But section 835 of the Revised Statutes provides: "No district attorney shall be allowed by the Attorney-General to retain of the fees and emoluments of his office which he is required to include in his semi-annual return, for his personal compensation, over and above the necessary expenses of his office, including necessary clerk-hire, to be audited and allowed by the proper accounting officers of the Treasury Department, a sum exceeding six thousand dollars a year, or exceeding that rate for any time less than a year."[4]

The district attorney for the southern district of New York, however, is entitled to receive quarterly a salary at the rate of six thousand dollars a year; and for extra services the district attorney for the district of California is entitled to receive a salary at the rate of five hundred dollars a year, and the district attorneys for all other districts at the rate of two hundred dollars a year;[5] and in addition to the salary of the district attorney of the southern district of New York, above mentioned, he is entitled to such additional sum as may be necessary, together with the costs and fees allowed him by law, to pay such amount as may be fixed by the Attorney General for the proper expenses of his office. But the restrictions above referred to do not prevent the allowance of additional compensation for services in prize cases.[6] In such cases

[1] Rev. Stat. § 834.
[2] Rev. Stat. § 825.
[3] Rev. Stat. § 827.
[4] Rev. Stat. § 835. For construction of this section see The Anna, Blatch. Pr. Cas. 337; *Ex parte* Robbins, 2 Gallis. 320.
[5] Rev. Stat. § 770.
[6] Rev. Stat. § 836.

the district attorney is allowed just and reasonable compensation, to be adjusted and determined by the court.[1] For fees of officers see *post*, ch. xiii.

§ 32. **Term and oath of office of district attorney.**—District attorneys are appointed for the term of four years, and their commissions expire at the end of four years from the date of the same; and every district attorney is required, before entering upon the duties of his office, to be sworn to a faithful execution of the duties of his office.[2] But no official bond seems to be required of him.

[1] Rev. Stat. § 4646.

[2] Rev. Stat. § 769.

CHAPTER IV.

TERMS AND SESSIONS OF THE DISTRICT COURTS.

§ 33. **Regular terms of the district courts.**—The Revised Statutes provide for the regular terms of the district courts, and other matters relating to them, which with various subsequent amendments are as follows:—

TERMS OF DISTRICT COURTS.—*Sec.* 572. The regular terms of the district courts shall be held at the times and places following; but when any of said dates shall fall on Sunday, the terms shall commence on the following day:

Alabama.—In the southern district of Alabama, at Mobile, on the fourth Monday[1] of December and the first Monday of June in each year; for the middle district, at Montgomery, on the first Monday of May and the first Monday of November in each year: for the northern district, at Huntsville, on the first Monday of April and the second Monday of October in each year.

Arkansas.—In the eastern district of Arkansas, at Little Rock, on the first Monday in April and October,[2] and at Helena, on the second Monday in March and October; in the western district of Arkansas, at Fort Smith, on the first Monday in February, May, August and November.

California.—In the district of California, at San Francisco, on the first Monday in April, on the second Monday in August, and on the first Monday in December.

Connecticut.—In the district of Connecticut, at New Haven, on the fourth Tuesday in February; at Hartford, on the fourth Tuesday in May; at New Haven, on the fourth Tuesday in August, and at Hartford, on the[3] first Tuesday in December.

Colorado.—[4] That terms of the circuit and district courts of the United States for the district of Colorado shall be held at the times and places hereinafter designated, namely: At Denver, on the first

[1] As amended by act of June 22, 1874, § 6, 18 Stat. 195.

[2] As amended by act of January 31, 1874, ch. 41, 19 Stat. 230.

[3] As amended by act of June 30, 1879, ch. 49, 21 Stat. 41.

[4] As amended by act of April 20, 1880, ch. 58, § 1, 21 Stat. 76.

Tuesday in May and the first Tuesday in October in each year; at Pueblo, on the first Tuesday in March in each year; at Del Norte, on the first Tuesday in September in each year.

Delaware.—In the district of Delaware, at Wilmington, on the second Tuesday in January, April, June and September.

Florida.—In the northern district of Florida, at Tallahassee, on the first Monday in February, at Pensacola, on the first Monday in March, and at Jacksonville, on the first Monday in December.

In the southern district of Florida, at Key West, on the first Monday in May and November.

That a term of the district and circuit courts of the United States shall be held in each year at Tampa, in said district, commencing on the first Monday in March, provided that nothing herein contained shall be construed to impair or affect the jurisdiction of the district court of the United States for the northern district of Florida, in any case, civil or criminal, pending therein at the time of the passage of this act, but the same shall be proceeded in to final disposition as if this act had not been passed.

Georgia.—In the northern district of Georgia, at Atlanta, on the first Monday in March and September.

In the southern district of Georgia, at Savannah, on the second Tuesday in February, May, August and November.

[1]A term of the circuit court and of the district court for the southern district of Georgia shall be held at Macon, in said state, on the first Monday of May and October in each year.

Illinois.—In the northern district of Illinois, at Chicago, on the first Monday in July and the third Monday in December.

In the southern district of Illinois, at Springfield, on the first Monday in January and June, and at Cairo, on the first Monday in March and October.

Indiana.—In the district of Indiana, at Indianapolis, on the first Tuesday in May and November, and at New Albany, on the first Monday in January and July, and at Evansville, on the first Monday in February and August.

[2]That there shall be two terms of the United States district and circuit courts for the district of Indiana, held in the city of Fort Wayne, Indiana, in each year, from and after the passage

[1] As amended by act of January 29, 1880, ch. 17, § 3, 21 Stat. 63.

[2] As amended by act of June 18, 1878, ch. 269, § 1, 20 Stat. 166.

of this act, the time and length of the terms to be fixed by the judges of said courts respectively.

[1]That each of said courts shall be held in a building to be provided for that purpose by the county or city authorities without expense to the United States.

Iowa.—In the northern district of Iowa, at Dubuque, on the third Tuesday in April and November, at Fort Dodge, on the third Tuesday in January and June, and at Sioux City, on the second Tuesday in February and July.[2]

In the southern district, at Keokuk, on the third Tuesday[3] in January and the third Tuesday in June.

In the central division, at Des Moines, on the second Tuesday in May and the third Tuesday in October.

In the western division, at Council Bluffs, on the fourth Monday in March and the fourth Monday in September.

Kansas.—In the district of Kansas, at the seat of government, on the second Monday in April, and at Leavenworth, on the second Monday in October.

[4]That there shall be one term of the United States district and circuit courts for the district of Kansas, held in the city of Fort Scott, in each year, the terms of said courts to be held on the second Monday in January from and after the passage of this act. But no cause of action or proceeding shall be tried or considered in the courts respectively herein provided for, unless by consent of all the parties thereto or order of the court for cause.

[5]That each of said courts shall be held in a building to be provided for that purpose by the county or city authorities without expense to the United States. If no suitable building is provided without expense to the United States, then and in that case no court shall be held at that place.

Kentucky.—In the district of Kentucky,[6] at Covington, on the second Monday in May and the first Monday in December; at Louisville, on the third Monday in February and the first Monday in October; at Frankfort, on the first Monday in January and the

[1] As amended by act of June 18, 1878, ch. 269, § 3, 20 Stat. 166.

[2] As amended by act of July 20, 1882, ch. 312, § 7.

[3] As amended by act of February 9, 1874, ch. 24, § 1, 18 Stat. 15.

[4] As amended by act of March 3, 1879, ch. 177, § 1, 20 Stat. 355.

[5] As amended by act of March 3, 1879, ch. 177, § 3, 20 Stat. 355.

[6] As amended by act of July 1, 1879, ch. 39, § 1, 21 Stat. 45.

second Monday in June; and at Paducah, on the first Monday in April and the third Monday in November.

Louisiana.—In the district of Louisiana, at New Orleans, on the third Monday in February, May and November.

Maine.—In the district of Maine, at Portland, on the first Tuesday in February; at Bangor, on the fourth Tuesday in June; at Bath, on the first Tuesday in September, and at Portland, on the first Tuesday in December.

Maryland.—In the district of Maryland, at Baltimore, on the first Tuesday in March, June, September and December.

Massachusetts.—In the district of Massachusetts, at Boston, on the third Tuesday in March, on the fourth Tuesday in June, on the second Tuesday in September, and on the first Tuesday in December.

Michigan.—In the eastern district of Michigan, at Detroit, on the first Tuesday in March, June and November.

[1]There shall be one or more terms of the district court for the eastern district of Michigan, held annually at the United States court room in the city of Port Huron in said district, at the discretion of the judge of said district court, and at such times as he shall appoint therefor.

[2]The regular terms of the circuit and district courts in said southern division (of the western district of Michigan) shall be held at the city of Grand Rapids, commencing on the first Tuesday in March and October in each year.

The regular terms of the circuit and district courts in said northern division (of the western district of Michigan) shall be held at the city of Marquette, commencing on the first Tuesday in May and September in each year.

And all issues of fact shall be tried at the terms of said courts to be held in the division where such suits shall hereafter be commenced; but nothing herein contained shall prevent the said circuit and district courts from regulating by general rule the venue of transitory actions, either in law or in equity, and from changing the same for cause.

Minnesota.—In the district of Minnesota, at Winona, on the first Monday in June, and at St. Paul, on the first Monday in October.

Mississippi.—In the northern district of Mississippi, at Oxford, on the first Monday in June and December.

[1] As amended by act of June 19, 1878, ch. 336, § 9, 20 Stat. 177.

[2] As amended by act of June 19, 1878, ch. 326, § 2, 20 Stat. 176.

In the southern district of Mississippi, at Jackson, on the fourth Monday in January and June.

Missouri.—In the eastern district of Missouri, at St. Louis, on the first Monday in May and November.

In the western district of Missouri, at Jefferson, on the first Monday in March and September.

The [1]western district of Missouri is hereby divided into two divisions, which shall be known as the eastern and western divisions of the western district of Missouri. The western division shall include the counties of Andrew, Atchison, Barton, Bates, Buchanan, Caldwell, Carroll, Cass, Chariton, Clay, Clinton, Daviess, De Kalb, Gentry, Grundy, Harrison, Holt, Jackson, Jasper, La Fayette, Linn, Livingston, Mercer, Nodaway, Platt, Putnam, Ray, Saline, Sullivan, Vernon and Worth, and a term of the district court and circuit court of the United States for said district shall be held therein at the city of Kansas, on the third Monday in May and the third Monday in October of each year. The remaining counties embraced in said district shall constitute the eastern division thereof, and the terms of the circuit and district courts of the United States for said district shall be held therein at the times and places now prescribed by law.

Nebraska.—In the district of Nebraska, at Omaha, on the first Monday in May and on the [2]second Monday in November in each year.

That [3]there shall be one term of the United States district and circuit courts for the district of Nebraska, held in the city of Lincoln, Nebraska, on the first Monday in January in each year, from and after the passage of this act, and one grand jury and one petit jury only shall be summoned and serve in both of said courts at each term thereof.

Nevada.—In the district of Nevada, at Carson City, on the first Monday in February, May and October.

New Hampshire.—In the district of New Hampshire, at Portsmouth, on the third Tuesday in March and September; at Exeter, on the third Tuesday in June and December.

New Jersey.—In the district of New Jersey, at Trenton, on the third Tuesday in January, April, June and September.

New York.—In the northern district of New York, at Albany,

[1] As amended by act of January 21, 1879, ch. 20, § 1, 20 Stat. 263.

[2] As amended by act of February 17, 1877, ch. 60, 19 Stat. 232.

[3] As amended by act of June 19, 1878, ch. 315, 20 Stat. 169.

on the third Tuesday in January; at Utica, on the third Tuesday in March; at Rochester, on the second Tuesday in May; at Buffalo, on the third Tuesday in August; at Auburn, on the third Tuesday in November; and, in the discretion of the judge of said court, one term annually at such time and place within the counties of Saint Lawrence, Clinton, Jefferson, Oswego and Franklin as he may from time to time appoint. Such appointment shall be made by a notice of at least twenty days published in the state paper of the state of New York, and in one newspaper published at the place where said court is to be held; and said term shall be held only for the trial of issues of fact arising within said counties.

In the southern district of New York, at the city of New York, on the first Tuesday in every month.

In the eastern district of New York, at Brooklyn, on the first Wednesday in every month.

North Carolina.—In the eastern district of North Carolina, at Elizabeth City, on the third Monday in April and October; at New Berne, on the fourth Monday in April and October; and at Wilmington, on the first Monday after the fourth Monday in April and October.

In the western district of North Carolina, at Greensborough, on the first Monday in April and October; at Statesville, on the third Monday in April and October; and at Asheville, on the first Monday in May and November.

[1] That additional terms of the district and circuit courts of the United States for the western district of North Carolina shall hereafter be held at the city of Charlotte, in said state, and that said terms shall commence respectively on the second Monday in June and the second Monday in December in each and every year, and shall continue until the business is disposed of.

Ohio.—In the eastern division of the northern district of Ohio, at Cleveland, on the first Tuesday in January, April and October.

[2] That a term of the circuit court and district court for the western division northern district of Ohio shall be held at Toledo, in said state, on the first Tuesday in the months of June and December in each year, and one grand jury and one petit jury only shall be summoned and serve in both of said courts at each term thereof.

[3] A term of the circuit court and of the district court for the

[1] As amended by act of June 19, 1878, ch. 322, 20 Stat. 173.

[2] As amended by act of June 8, 1878, ch. 169, 20 Stat. 101.

[3] As amended by act of February 4, 1880, ch. 18, § 2, 21 Stat. 64.

southern district of Ohio shall be held at Columbus, in said state, on the first Tuesday in the months of June and December in each year.

In the southern district of Ohio, at Cincinnati, on the first Tuesday in February, April and October.

Oregon.—In the district of Oregon, at Portland, on the first Monday in March, July and November.

Pennsylvania.—In the eastern district of Pennsylvania, at Philadelphia, on the third Monday in February, May, August and November.

In the western district of Pennsylvania, at Pittsburgh, on the first Monday in May and on the third Monday in October; at Williamsport, on the third Monday in June and on the first Monday in October; at Erie, on the second Monday in January and the third Monday in July.

Rhode Island.—In the district of Rhode Island, at Providence, on the first Tuesday in February and August; at Newport, on the second Tuesday in May and the third Tuesday in October.

South Carolina.—In the eastern district of South Carolina, at Charleston, on the first Monday in January, May, July and October. In the western district, at Greenville, on the first Monday in August.

Tennessee.—In the eastern district of Tennessee, at Knoxville, on the second Monday in January and July.

In the middle district of Tennessee, at Nashville, on the third Monday in April and October.

In the western district of Tennessee, at Memphis, on the fourth Monday in May and November.

[1] A term of the circuit court and of the district court for the eastern district of Tennessee shall be held at Chattanooga, in said state, in each year on the first Monday in April and October.

[2] The western district of Tennessee is hereby divided into two divisions, which shall be known as the eastern and western divisions thereof. The eastern division shall include the counties of Benton, Carroll, Decatur, Gibson, Henderson, Henry, Madison, McNairy, Hardin, Dyer, Lake, Crockett, Weakley and Obion; and terms of the circuit and district courts of the United States for said district shall be held therein at the town of Jackson, in the county of Madison, at least twice in each year, at such times as the judges

[1] As amended by act of June 11, 1878, ch. 359, 20 Stat. 235, and March 1880, ch. 203, § 2, 21 Stat. 175. 3, 1879, ch. 1820, 2 Stat. 398.

[2] As amended by act of June 20,

thereof shall respectively fix. The remaining counties embraced in said district shall constitute the western division thereof, and terms of the district and circuit courts of the United States for said district shall be held therein at the time and place now prescribed by law.

Texas.—[1]That the courts in the northern judicial district (of Texas) shall be held twice in each year at Waco, Dallas, and at Graham in Young County; and the courts in the eastern judicial district shall be held twice in each year at Galveston, Tyler and Jefferson; and the courts in the western judicial district shall be held twice in each year at Brownsville, San Antonio and Austin. The courts shall be held in the city of Waco on the first Monday in April and October; in the city of Dallas, on the first Monday in June and December; in the town of Graham, Young County, on the first Monday in February and August; in the city of Galveston, on the first Monday in November and March; at the city of Tyler, on the second Monday in January and May; at the city of Jefferson, on the second Monday in February and September; at the city of Brownsville, on the first Monday in January and July; at San Antonio, on the first Monday in May and November; at Austin, on the first Monday in February and August. And the district judge of each of said districts shall have power to fix adjourned terms at all of said places, so as to dispose of the whole of the business of said courts.

Vermont.—In the district of Vermont, at Burlington, on the fourth Tuesday in February; at Windsor, on the [2]third Tuesday in May; at Rutland, on the first Tuesday in October.

Virginia.—In the eastern district of Virginia, at Richmond, on the first Monday in April and October; at Alexandria, on the first Monday in January and July; and at Norfolk, on the first Monday in May and November.

In the western district of Virginia, at Danville, on the Tuesday after the fourth Monday in February [3]and on the fifteenth day of November, but if said last-mentioned day shall fall on Sunday, the term shall commence on the following day; at Lynchburg, on the Tuesday after the third Monday in March and September; at

[1] As amended by act of February 24, 1879, ch. 97, § 4, 20 Stat. 318.

[2] As amended by act of June 5, 1874, ch. 214, 18 Stat. 53.

[3] As amended by act of June 11, 1878, ch. 182, 20 Stat. 111.

Abingdon, on the Tuesday after the fourth Monday in May and October; and at Harrisonburg, on the Tuesday after the first Monday in May, and the Tuesday after the second Monday in October.

West Virginia.—[1] That hereafter the district court of the United States for the district of West Virginia shall be held at the times and places following, but when any of said dates shall fall on Sunday, the term shall commence the following Monday, to wit: At the city of Wheeling, on the first day of March and the first day of September; at Clarksburg, on the first day of April and the first day of October; at Charlestown, on the first day of May and the first day of November.

Wisconsin.—In the eastern district of Wisconsin, at Oshkosh, on the [2]second Tuesday of July of each year; at Milwaukee, on the first Monday in January and October.

In the western district of Wisconsin, at Madison, on the first Monday in June; and at La Crosse, on the third Tuesday in September.

EFFECT OF CHANGING TIME OF HOLDING DISTRICT COURTS.—*Sec.* 573. No action, suit, proceeding or process in any district court shall abate or be rendered invalid by reason of any act changing the time of holding such court; but the same shall be deemed to be returnable to, pending and triable in the terms established next after the return day thereof.

COURT ALWAYS OPEN AS A COURT OF ADMIRALTY FOR CERTAIN PURPOSES.—*Sec.* 574. The district courts, as courts of admiralty, and as courts of equity so far as equity jurisdiction has been conferred upon them, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. And any district judge may, upon reasonable notice to the parties, make, and direct and award, at chambers, or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

[1] As amended by act of March 9, 1878, ch. 27, 20 Stat. 27.

[2] As amended by act of June 16, 1874, ch. 286, § 1, 18 Stat. 75.

DISTRICT COURT IN THE SOUTHERN DISTRICT OF FLORIDA.—*Sec.* 575. The district court for the southern district of Florida shall at all times be open, for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction.

DISTRICT COURTS IN WISCONSIN.—*Sec.* 576. The district courts of the districts of Wisconsin shall at all times be open, for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction, so far as the same can be done without a jury.

DISTRICT COURTS IN KENTUCKY AND INDIANA.—*Sec.* 577. In the districts of Kentucky and Indiana the terms of the district courts shall not be limited to any particular number of days, nor shall it be necessary to adjourn by reason of the intervention of a term of the court elsewhere; but the court intervening may be adjourned over till the business of the court in session is concluded.

ADJOURNMENT IN CRIMINAL CASES.—*Sec.* 578. District courts shall hold monthly adjournments of their regular terms, for the trial of criminal causes, when their business requires it to be done, in order to prevent undue expenses and delays in such cases.

ADJOURNED TERMS.—*Sec.* 579. The judge of any district court in Indiana, Kentucky, Louisiana, Michigan, Ohio, Pennsylvania and Texas may adjourn the same from time to time, to meet the necessities or convenience of the business.

ADJOURNED TERMS IN KENTUCKY AND INDIANA.—*Sec.* 580. In the districts of Kentucky and Indiana the intervention of a term of the district court at another place, or of a circuit court, shall not preclude the power to adjourn over to a future day.

SPECIAL TERMS.—*Sec.* 581. A special term of any district court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, and at such time and upon such notice as may be ordered by the district judge. And any business may be transacted at such special term which might be transacted at a regular term.

TENNESSEE; WHEN CIRCUIT JUDGES MAY ACT AS DISTRICT JUDGES.—*Sec.* 582. In the case of the non-attendance of the district judge of Tennessee at any term of the district court in either of the districts thereof, the circuit justice or circuit judge of the circuit to which such district belongs may hold such term, and shall have and exercise the jurisdiction and powers given by law to a district judge.

ADJOURNMENT IN CASE OF NON-ATTENDANCE OF A JUDGE.—*Sec.* 583. If the judge of any district court is unable to attend at the commencement of any regular, adjourned or special term, the court may be adjourned by the marshal, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct.

THE SAME IN CERTAIN STATES.—*Sec.* 584. If the judge of any district court in Alabama, California, Georgia, Indiana, Iowa, Kentucky, North Carolina, Tennessee or West Virginia is not present at the time for opening the court, the clerk may open and adjourn the court from day to day for four days; and if the judge does not appear by two o'clock after noon of the fourth day, the clerk shall adjourn the court to the next regular term. But this section is subject to the provisions of the preceding and next sections.

ADJOURNMENT IN INDIANA AND KENTUCKY.—*Sec.* 585. In the districts of Indiana and Kentucky, the district judge, in the case provided in the preceding section, may, by a written order to the clerk within the first three days of his term, adjourn the district court to a future day within thirty days of the first day. The clerk shall give notice of such adjournment by posting a copy of said order on the front door of the court house where the court is to be held.

INTERMEDIATE TERMS IN CALIFORNIA, IOWA AND TENNESSEE. —*Sec.* 586. Whenever the judge of any district court in the districts of California, Iowa and Tennessee fails to hold any regular term thereof, it shall be his duty, if it appears that the business of the court requires it, to hold an intermediate term. Such intermediate term shall be appointed by an order under his hand and seal, addressed to the clerk and marshal at least thirty days previous to the time fixed therein for holding it, and the order shall be published the same length of time in the several newspapers published within such districts respectively. And at such intermediate term the business of the court shall have reference to and be proceeded with in the same manner as if it were a regular term.

BUSINESS CERTIFIED TO CIRCUIT COURT IN CASE OF DISABILITY OF DISTRICT JUDGE.—*Sec.* 587. When satisfactory evidence is shown to the circuit judge of any circuit, or, in his absence, to the circuit justice allotted to the circuit, that the judge of any dis-

trict therein is disabled to hold a district court, and to perform the duties of his office, and an application accordingly is made in writing to such circuit judge or justice, by the district attorney or marshal of the district, the said judge or justice, as the case may be, may issue his order in the nature of a certiorari, directed to the clerk of such district court, requiring him forthwith to certify into the next circuit court to be held in said district all suits and processes, civil and criminal, depending in said district court, and undetermined, with all the proceedings thereon, and all the files and papers relating thereto. Said order shall be immediately published in one or more newspapers printed in said district, at least thirty days before the session of such circuit court, and shall be sufficient notification to all concerned; and thereupon the circuit court shall proceed to hear and determine the suits and processes so certified. And all bonds and recognizances taken for, or returnable to, such district court, shall be held to be taken for, and returnable to, said circuit court, and shall have the same effect therein as they could have had in the district court to which they were taken. (See § 637.)

SUITS BROUGHT IN DISTRICT COURT AFTER ORDER TO CERTIFY TO CIRCUIT COURT.—*Sec.* 588. When an order has been made as provided in the preceding section, the clerk of the district court shall continue, during the disability of the district judge, to certify, as aforesaid, all suits, pleas and processes, civil and criminal, thereafter begun in said court, and to transmit them to the circuit court next to be held in that district; and the said court shall proceed to hear and determine them as provided in said section; *provided*, that when the disability of the district judge ceases or is removed, the circuit court shall order all such suits and proceedings then pending and undetermined therein, in which the district courts have an exclusive original cognizance, to be remanded, and the clerk of such court shall transmit the same, with all matters relating thereto, to the district court next to be held in that district; and the same proceedings shall then be had in the district court as would have been had if such suits had originated or been continued therein.

CONSTRUCTION OF THE FOREGOING SECTION.—The language of the statute evidently supposes a district judge in existence to whom the causes may be remanded. It does not direct a *certiorari* on his death, but on his disability. It does not suppose a vacancy,

but an incumbency, in the office. The meaning of the statute must be that while there is a judge in office who is disabled to hold a court, his duties shall be performed by the circuit court during the disability. With his death the disability ceases, a vacancy ensues in the office, and a new appointment awakens in full vigor the powers of the district court.[1]

POWERS OF DISTRICT JUDGE VESTED DURING DISABILITY IN CIRCUIT JUDGE.—*Sec.* 589. In the case provided in the two preceding sections, the circuit judge, and in his absence the circuit justice, shall have and exercise, during such disability, all the powers of every kind vested by law in such district judge. But this provision does not require them to hold any special court, or court of admiralty, at any other time than that fixed by law for holding the circuit court in said district.

PREPARATORY EXAMINATIONS AND ORDERS IN ADMIRALTY CASES BY THE CLERK.—*Sec.* 590 (as amended by act of February 18, 1875, ch. 80, 18 Stat. 317). When the business of a district court is certified into the circuit court on account of the disability of the district judge, the district clerk shall be authorized, by order of the circuit judge, or, in his absence, of the circuit justice within whose circuit such district is included, to take, during such disability, all examinations and depositions of witnesses, and make all necessary rules and orders, preparatory to the final hearing of all causes of admiralty and maritime jurisdiction.

DISTRICT JUDGE DESIGNATED TO PERFORM DUTIES OF DISABLED JUDGE.—*Sec.* 591. When any district judge is prevented, by any disability, from holding any stated or appointed term of his district court, or of the circuit court in his district, in the absence of the other judges, and that fact is made to appear by the certificate of the clerk, under the seal of the court, to the circuit judge, or, in his absence, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may, if in his judgment the public interests so require, designate and appoint the judge of any other district in the same circuit to hold said courts, and to discharge all the judicial duties of the judge so disabled, during such disability. Such appointment shall be filed in the clerk's office, and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court, shall be

[1] Story, J., in *Ex parte* U. S., 1 Gallis. 338.

R. H. F. Variel

transmitted by the district clerk to the judge so designated and appointed.

DESIGNATION OF ANOTHER JUDGE IN CASE OF ACCUMULATION OF BUSINESS.—*Sec.* 592. When, from the accumulation or urgency of business in any district court, the public interests require the designation and appointment hereinafter provided, and the fact is made to appear, by the certificate of the clerk, under the seal of the court, to the circuit judge, or, in his absence, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may designate and appoint the judge of any other district in the same circuit to have and exercise within the district first named the same powers that are vested in the judge thereof; and each of the said district judges may, in case of such appointment, hold separately at the same time a district or circuit court in such district, and discharge all the judicial duties of a district judge therein; but no such judge shall hear appeals from the district court.

WHEN DESIGNATION OF ANOTHER JUDGE BY THE CHIEF JUSTICE OF THE UNITED STATES.—*Sec.* 593. If the circuit judge and circuit justice are absent from the circuit, or are unable to execute the provisions of either of the two preceding sections, or if the district judge so designated is disabled or neglects to hold the courts and transact the business for which he is designated, the district clerk shall certify the fact to the Chief Justice of the United States, who may thereupon designate and appoint, in the manner aforesaid, the judge of any district within such circuit or within any circuit next contiguous; and said appointment shall be transmitted to the district clerk, and be acted upon by him as directed in the preceding section.

REVOCATION AND NEW APPOINTMENTS.—*Sec.* 594. The circuit judge or circuit justice, or the Chief Justice, as the case may be, may from time to time, if in his judgment the public interests so require, make a new designation and appointment of any other district judge within the said circuits, for the duties and with the powers mentioned in the three preceding sections, and to revoke any previous designation and appointment.

DUTY OF DISTRICT JUDGE TO COMPLY WITH THE DESIGNATION AND APPOINTMENT.—*Sec.* 595. It shall be the duty of the district judge who is designated and appointed under either of the four

preceding sections to discharge all the judicial duties for which he is so appointed, during the continuance of such disability, or, in the case of an accumulation of business, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district.

DESIGNATION OF JUDGE WHEN PUBLIC INTEREST REQUIRES IT.—*Sec.* 596. It shall be the duty of every circuit judge, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section five hundred and ninety-one, the district judge of any judicial district within his circuit to hold a district or circuit court in the place or in aid of any other district judge within the same circuit; and it shall be the duty of the district judge so designated and appointed, to hold the district or circuit[1] as aforesaid, without any other compensation than his regular salary as established by law, except in the case provided in the next section.

EXPENSES OF JUDGE DESIGNATED TO SOUTHERN DISTRICT OF NEW YORK.—*Sec.* 597. Whenever a district judge from another district holds a district or circuit court in the southern district of New York, in pursuance of the preceding section, his expenses, not exceeding ten dollars a day, certified by him, shall be paid by the marshal of said district, as a part of the expenses of the court, and shall be allowed in the marshal's account.

DISABILITY OF JUDGES IN FLORIDA.—*Sec.* 598. When a certificate of the judge of either of the districts of Florida, stating that he is disabled to hold any regular, special or adjourned term of the court of such district, and requesting the judge of the other district to hold the same, is filed in the clerk's office of the place where it is to be held, the judge of the other district is authorized to hold such courts, and to exercise all the powers of district judge, in the district of the judge so certifying.

DISABILITY OF JUDGES IN NEW YORK.—*Sec.* 599. Whenever the judge of the northern district of New York is disabled to perform the duties of his office, it shall be the duty of the judge of the southern district, upon receiving from him notice thereof, to hold the district court, and to perform all the duties

[1] The word court omitted.

of district judge for such district. And whenever the judge of the southern district is so disabled, it shall be the duty of the judge of the eastern district, upon a like notice, to hold the district court, and to perform all the duties of district judge for the southern district. In such cases the said judges, respectively, shall have the same powers as are vested in the judge so disabled.

When judge of eastern district of New York may act in southern.—*Sec.* 600. Whenever the judge of the southern district of New York deems it desirable, on account of the pressure of public business or other cause, that the judge of the eastern district shall perform the duties of a district judge in the southern district, an order to that effect may be entered upon the records of the district court thereof; and thereupon the judge of the eastern district shall have power to hold the district court, and to perform all the duties of district judge for the southern district.

When a judge is interested in a suit pending before him. —*Sec.* 601. Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof, with all the proceedings in the suit, shall be forthwith certified to the next circuit court for the district; and if there be no circuit court therein, to the next circuit court in the state; and if there be no circuit court in the state, to the next convenient circuit court in an adjoining state; and the circuit court shall, upon the filing of such record with its clerk, take cognizance of and proceed to hear the case, in like manner as if it had originally and rightfully been commenced therein. (See § 637.)

Continuances by vacancy in office of the judge.—*Sec.* 602. When the office of judge of any district court is vacant, all process, pleadings and proceedings pending before such court shall be continued of course until the next stated term after the appointment and qualification of his successor; except when such first-mentioned term is held as provided in the next section.

Vacancy in office of district judge.—*Sec.* 603. When the office of district judge is vacant in any district in a state containing

two or more districts, the judge of the other or of either of the other districts may hold the district court, or the circuit court in case of the sickness or absence of the other judges thereof, in the district where the vacancy occurs, and discharge all the judicial duties of judge of such district during such vacancy; and all the acts and proceedings in said courts, by or before such judge of an adjoining district, shall have the same effect and validity as if done by or before a judge appointed for such district.

CHAPTER V.

JURISDICTION OF THE DISTRICT COURTS.

§ 34. **Jurisdiction, special and limited.**—Having treated of the organization and constitution of the district courts and of the terms and sessions thereof, we will now proceed to consider their jurisdiction and point out some of the general rules of practice and procedure therein. The jurisdiction of these courts is less varied and extensive than that of the circuit courts, and it has remained substantially the same ever since their original institution; whereas the jurisdiction of the circuit courts has been much enlarged within the last few years, and especially by the liberal provisions of statutes for the removal of causes thereto from the state courts. The business of the district courts is mainly limited to the cognizance of certain crimes and offences under the laws of the United States, to proceedings for the recovery of penalties and forfeitures, and to matters of admiralty and maritime jurisdiction. The criminal jurisdiction of these courts is limited to offences which are expressly made such by the statutes of the United States; and they have, in a strict sense, no common law jurisdiction of crimes, or jurisdiction of the crimes known to the common law, unless such jurisdiction is conferred by some act of Congress.[1] But they have general admiralty and maritime jurisdiction, and in the exercise thereof they are only subject to, and controlled by, the general principles of admiralty and maritime jurisprudence, unless otherwise provided by statute law, which we shall hereafter consider.

§ 35. **Jurisdiction of crimes and offences.**—In relation to the jurisdiction of the district courts of crimes and offences, the statute provides that they shall have jurisdiction "of all crimes and offences cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the

[1] United States *v.* Barney, 5 Blatch. 294; United States *v.* Hudson, 7 Cr. 32; United States *v.* Cooledge, 1 Wh. 415; United States *v.* Bevans, 3 Wh. 336. In the exercise of their criminal jurisdiction they possess the incidental common law authority to fine for contempts and imprison for contumacy. Id.

punishment of which is not capital, except in the cases mentioned in section 5412, title CRIMES."[1]

In cases where the punishment is capital, and in those cases embraced in section 5412 of the Revised Statutes, the circuit courts have exclusive jurisdiction, and in all other cases of crimes and offences the district courts have jurisdiction concurrent with the circuit courts.[2]

The jurisdiction thus conferred on the federal courts in criminal cases is exclusive of any jurisdiction of the courts of the several states. The state courts cannot, consistently with the Constitution of the United States, exercise jurisdiction of offences against the laws of the United States; nor can such jurisdiction be delegated to them.[3] Nor can the state tribunals or its judges in any manner interfere with the exercise of the jurisdiction of the district courts in criminal cases, by habeas corpus or otherwise; nor can the validity of the proceedings of such courts be in any manner reviewed or called in question by any state court or judge thereof.[4]

§ 36. **In case of piracy, penalties and forfeitures.**—The district courts have jurisdiction of all cases arising under any statute of the United States for the punishment of piracy, when there is no circuit court held in the district of such court;[5] and of all suits for penalties and forfeitures incurred under any law of the United States.[6] But we have already noticed that the circuit courts have concurrent jurisdiction of all crimes and offences cognizable in the district courts, which we shall hereafter more particularly consider.[7]

§ 37. **Suits by the United States or officers; limitation of suits.**—It is a familiar doctrine of the law that a sovereign cannot be sued in his own court without his consent. This doctrine is applicable to the United States as a sovereign authority, and not until the creation of a court by an act of Congress, known as the Court of Claims, and the giving of it cognizance of certain causes of action against the United States, of which we shall treat hereafter, could the government be sued in the federal courts.[8] But the statute gives the district courts jurisdiction "of suits at common law

[1] Rev. Stat. § 563, sub. 1.
[2] Id. § 629, sub. 20.
[3] United States *v.* Halliday, 3 Wall. 407; Stearns *v.* United States, 2 Paine (C. C.) 300.
[4] Ableman *v.* Booth, 21 How. 507.
[5] Rev. Stat. § 563, sub. 2.
[6] Rev. Stat. § 563, sub. 3.
[7] Rev. Stat. § 629, sub. 20.
[8] See *post*, ch. xviii.

brought by the United States, or by any officer thereof authorized by law to sue."[1]

The jurisdiction thus conferred upon the district courts is, however, not exclusive; but the United States, as a body corporate and sovereign authority, may institute suits, like other corporate bodies, in any court of any state in the Union; and in this respect she has the same rights and is entitled to the same remedies as natural persons.[2] She may maintain a suit at common law in assumpsit or trespass; and if the suit is to recover on negotiable paper, she possesses the same rights and incurs the same liabilities as natural persons under similar circumstances.[3]

§ 38. **Suits in equity to enforce internal revenue taxes.**—The district courts have, also, jurisdiction "of all suits in equity to enforce the lien of the United States upon any real estate for any internal revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent, or in which he has any right, title or interest;"[4] and "of all suits for the recovery of any forfeiture or damages under section thirty-four hundred and ninety" of the Revised Statutes, and all such suits may be tried and determined by any district court within whose jurisdictional limits the defendant may be found.[5] And in all cases where a cause of action arises under the postal laws of the United States, they have concurrent jurisdiction with the circuit courts.[6]

§ 39. **Admiralty and prize causes.**—The most important function of the district courts, however, is that which relates to their admiralty and maritime jurisdiction. The great extent of our seacoast, and the magnitude of our shipping interests both coast-wise and foreign, naturally causes frequent and important controversies of an admiralty and maritime character, and the jurisdiction of these courts is frequently invoked in such cases. Their original admiralty and maritime jurisdiction is, with few exceptions, exclusive of all other federal courts, and in all cases exclusive of the state tribunals.[7] On this subject the statute provides that these courts shall

[1] Rev. Stat. § 563, sub. 4. The same jurisdiction is also conferred by statute upon the circuit courts. Rev. Stat. § 629, sub. 3.

[2] Duygan *v.* United States, 3 Wh. 172; Cotton *v.* United States, 11 How. 229.

[3] United States *v.* Bank, 15 Pet. 377; United States *v.* Gear, 3 How. 120; United States *v.* Dunn, 6 Pet. 51; The Floyd Acceptances, 7 Wall. 666.

[4] Rev. Stat. § 563, sub. 5.

[5] Rev. Stat. § 563, sub. 6.

[6] Rev. Stat. § 563, sub. 7; Id. § 629.

[7] The Moses Taylor, 4 Wall. 411; The Hine, 4 Wall. 555; The Steam-

have jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts."[1] Exclusive cognizance is also given to the district courts of all prizes brought into the United States, except prizes taken in pursuance of the provisions of the statute authorizing the confiscation of property employed in aid of any insurrection against the government of the United States, in which cases the circuit courts have also concurrent jurisdiction.[2] The jurisdiction of the federal courts in prize causes is necessarily exclusive of any authority or cognizance by the state courts, as all such controversies must arise under the Constitution and laws of the United States.[3]

§ 40. **General principles relating to admiralty.**—It does not come within the scope of this treatise to treat fully of the doctrines and principles of admiralty and maritime law. It will be mainly our purpose to notice those changes and modifications of the general doctrines and principles, by statutes and rules of the federal courts and the practice therein.

The jurisdiction of courts in admiralty rests upon two broad grounds; one the subject-matter of contracts, the other locality, in torts. To give jurisdiction in case of contract, it is necessary that the contract be of a maritime character, as understood and interpreted in the admiralty; such as a contract to carry merchandise or passengers on the high seas or navigable waters;[4] or for seamen's wages;[5] or for the pilot's services;[6] or for material or supplies furnished in a foreign port, and the like.[7]

boat Co. *v.* Chase, 16 Wall. 529; The St. Lawrence, 1 Black 526; The Isabella, 1 Brown's Ad. 96; Railroad Co. *v.* Whitton, 13 Wall. 270; Jansen *v.* The Magdalena, Bee 11.

[1] Rev. Stat. § 563, sub. 8.

[2] Rev. Stat. § 563, sub. 8, 9; and amendment, February 18, 1875; Rev. Stat. § 629, sub. 6; Rev. Stat. §§ 5308, 5309.

[3] Rev. Stat. § 711, sub. 2, 4; United States *v.* Lathrop, 17 Johns. 4; Jackson *v.* Rose, 2 Va. Cas. 34; Ordway *v.* Central National Bank, 47 Md. 217; Blitz *v.* Columbia National Bank, 87 Pa. 87. See *contra* in state courts, Ely *v.* Peck, 7 Conn. 239; M. R. Telegraph Co. *v.* First National Bank, 74 Ill. 217.

[4] The Moses Taylor, 4 Wall. 411; Morewood *v.* Enequist, 23 How. 491.

[5] Sheppard *v.* Taylor, 5 Pet. 675; The Gazelle, 1 Sprague 378.

[6] Hobart *v.* Drogan, 10 Pet. 108; *Ex parte* McNiel, 13 Wall. 236.

[7] The Robert Fulton, 1 Paine 620;

But contracts for material or supplies furnished in the original construction of a vessel are not maritime contracts.[1] And where two parties joined in an adventure, in which one was to contribute his skill, labor and experience, and the other was to furnish a vessel, and each was to have a certain portion of the profits, this was held not to be a maritime contract that could confer admiralty jurisdiction upon the court.[2] And it may be observed, generally, that the admiralty has no jurisdiction at all in mere matters of account between the part owners of vessels, although they may relate purely to maritime affairs.[3]

§ 41. **Maritime liens.**—The jurisdiction of the district courts in admiralty is frequently exercised for the purpose of enforcing liens created by virtue of maritime contracts. These courts have jurisdiction "of all causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it." But the common law courts and remedies afford no means of enforcing maritime liens. The Constitution of the United States and acts of Congress have vested the admiralty and maritime powers exclusively in the federal courts of the United States, and hence no state has authority to constitute courts with these powers; and the common law remedies are not applicable to the enforcement of liens by proceedings *in rem*. The provision, therefore, "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it," can give state or federal courts, as courts of law, jurisdiction only of suits on maritime contracts, where the proceedings for the non-fulfillment of such contracts are *in personam*, and where the libellant is willing to waive the lien. But in such proceedings the party is entitled to the benefit of the laws of the state relating to attachments, to secure his claim, under the same circumstances as other suitors in the courts.[4] A contract to build a ship, or to furnish materials for this purpose, is not a maritime contract; but the

The St. Lawrence, 1 Black 522; The General Smith, 4 Wh. 433; Zane *v.* The President, 4 Wash. 453.

[1] People's Ferry Company *v.* Beers, 20 How. 393; Roach *v.* Chapman, 22 How. 129; Edwards *v.* Elliott, 21 Wall. 532; The Revenue Cutter, 4 Saw. 143.

[2] Ward *v.* Thompson, 22 How. 330; Steamboat Orleans, 11 Pet. 175.

[3] Id. See also Davis *v.* Child, 2 Ware 78; Atkyns *v.* Burrows, 1 Pet. Ad. 244; Kellum *v.* Emerson, 2 Curt. 79; Hazard *v.* Howland, 2 Sprague 68; Grant *v.* Poillon, 20 How. 163; Daily *v.* Doe, 3 Fed. Rep. 903.

[4] The Belfast, 7 Wall. 624; The Lottawanna, 21 Wall. 558; The Hine *v.* Trevor, 4 Wall. 555; s. c., 17 Id. 349.

legislatures of the states may create liens on such contracts and provide means for their enforcement, as this would not be inconsistent with the admiralty jurisdiction of the district courts of the United States or amount to a regulation of commerce.[1]

§ 42. **What liens by contract will be enforced.**—Among the liens growing out of contracts, which may be enforced on the admiralty side of the court, we may mention the liens which exist in favor of shippers, upon the vessels employed in the transportation of their goods and merchandise. The lien exists as security for the proper fulfillment of the contract of affreightment, which usually binds the carrier to duly transport, safely keep and properly deliver the goods and merchandise described in the contract. A lien also exists in favor of material-men, in certain cases, as security for the price or value of material furnished.[2] By the general principles of admiralty law, jurisdiction did not attach to contracts in favor of material-men for materials furnished in the original construction of vessels, or for materials or supplies furnished thereafter in a home port. But it is generally conceded that Congress has power to extend the jurisdiction of the federal courts to such cases, although it has not, nor has any state, power to limit the jurisdiction of the federal courts in admiralty.[3] The question was recently presented to the Supreme Court, whether the liens of material-men, created by the laws of a state, can be enforced in admiralty in the district courts of the United States. The court determined that Congress might, under the power to regulate commerce, authorize liens in such cases, and that such legislation would supersede any state legislation on the subject, and that in the absence of such action on the part of Congress the states might make valid laws on the subject, which would be enforced by the federal courts in the exercise of their admiralty jurisdiction, although authority could not be conferred upon the state courts for this purpose.[4]

§ 43. **Suits by material-men.**—The general doctrine in admiralty is that a party furnishing necessary supplies or repairs to a ship in

[1] Edwards *v.* Elliott, 21 Wall. 532; s. c., 34 N. J. 96; The St. Lawrence, 1 Black 522; The Chusan, 2 Story 456.

[2] The Belfast, 7 Wall. 624; The Maggie Hammond, 9 Wall. 435; The Bird of Paradise, 5 Wall. 545; The Eddy, 4 Wall. 1.

[3] The Lottawanna, 21 Wall. 558.

[4] The Lottawanna, 21 Wall. 558; Edwards *v.* Elliott, 21 Wall. 532. See also The St. Lawrence, 1 Black 522; The Richard Busteed, 1 Sprague 441; Weaver *v.* The Owens, 1 Wall. Jr. 359; The Samuel Strong, 6 McLean 587; The General Smith, 4 Wh. 438; The Maggie Hammond, 9 Wall. 435.

a foreign port may enforce a lien therefor on the ship in a court of admiralty jurisdiction by a proceeding *in rem*, or that he may waive his right to a lien and proceed, as we have seen, against the master or owner *in personam*.[1]

Under a rule in admiralty in this country the doctrine has been extended so as to allow the enforcement of a lien "in all suits by material-men for supplies or repairs or other necessaries; and in such cases the libellant may proceed against the ship and freight *in rem*, or against the master or owner *in personam*.[2]

But under this rule it has been held that in every case of a contract for supplies to a vessel, whether domestic or foreign, being a maritime contract, process *in rem* against the vessel, or *in personam* against the master or owner, may, at the option of the libellant, be resorted to where it is necessary to enforce the contract.[3]

The party thus entitled to a lien may, as we have seen, waive it, and this may be done expressly or it may be presumed from acts and circumstances. If it is manifest from the facts of the case that the material-man waived the lien and depended upon the personal responsibility of the master or owner of the ship, the lien would, at least as to the intervening rights of innocent third parties, be treated as waived. Where a promissory note was given for the debt incurred for supplies, it was held that a suit to enforce a lien for them could not be maintained if the note was not tendered or given up and surrendered to the defendant at or before the hearing.[4] This right, however, to enforce the lien has been held to exist where a bottomry bond in part void was executed therefor in the foreign port where the supplies and material were furnished.[5]

The giving of credit for necessary supplies does not, ordinarily, extinguish the lien therefor, nor does the permission of the ship to depart on her voyage without payment. The material-man generally has, by the maritime law, a threefold remedy, even where a lien exists: first, against the vessel *in rem;* second, against the owners; third, against the master; and neither remedy will be

[1] The Aurora, 1 Wh. 96; The General Smith, 4 Wh. 438; The Robert Fulton, 1 Paine 620; The Ship Virgin, 8 Pet. 538; The Patapsco, 13 Wall. 329; The Brig Nestor, 1 Sum. 73; Andrews *v.* Wall, 3 How. 568; Davis *v.* Child, 2 Ware 78.

[2] Adm. Rule 12, adopted May 6, 1872.

[3] The Steamship Circassian, 11 Blatch. 473; 12 Am. Law Reg. 291.

[4] Ramsey *v.* Allege, 12 Wh. 611.

[5] The Ship Virgin, 8 Pet. 538.

considered waived or displaced except where it is shown that the credit was given exclusively to or on account of one of the others.[1]

The district courts of the United States can also properly take cognizance of a lien which exists by the maritime law of other nations, and enforce it here as a matter of comity, although all the parties to the suit be foreigners.[2]

In all cases, however, of a claim of a lien for supplies or material furnished to a ship in a foreign port, it seems necessary to show that the supplies or material were necessary to enable the ship to complete her voyage. And if it can be reasonably presumed that the master had funds or that the owner had credit, this has been held to be sufficient to displace the lien. But when the lien is reasonably established, it would evidently require strong circumstances of confederation on the part of the material-man with the master, amounting to a fraud, in order to displace the lien on that ground and defeat a suit for its enforcement.[3] But the lien should be enforced within a reasonable time after the debt becomes due, or it will not avail against a *bonâ fide* purchaser without notice.[4]

§ 44. **Maritime hypothecation.**—According to the doctrines of admiralty and maritime jurisprudence, the master or owner may hypothecate the ship in a foreign port to procure funds for necessary repairs so as to enable her to proceed and complete the contemplated voyage. This is usually effected by what is denominated a bottomry bond, as the advancement is made on the faith or security of the bottom of the ship.[5] But such bond, if made by the master, is void unless the advances are necessary to effectuate the objects of the voyage or the safety of the ship, and also where the supplies or repairs could have been procured on the owner's credit or with his funds at the place where they were furnished. And in order to recover on such bond it is usually necessary for the libellant to furnish satisfactory evidence that the money was advanced after due inquiry and reasonable grounds of belief that the

[1] The Marion, 1 Story 68; The Nestor. 1 Sum. 73.

[2] The Maggie Hammond, 9 Wall. 435; The Schooner Marion, 1 Story 68.

[3] The Patapsco, 13 Wall. 329; Pritchard & Co. *v.* The Lady Horatio, Bee's Adm. 167.

[4] The Barque Chusan, 2 Sum. 456.

[5] Seldon *v.* Hendrickson, 1 Brock. C. C. 396; Carrington *v.* Pratt, 18 How. 67. See also *post*, § 45.

repairs or supplies were necessary and that the owner was without credit or funds in the foreign port.[1]

The master has the power to hypothecate his ship, even after the original voyage has been broken up by capture and the compulsory sale of her cargo, if she is in a foreign port and repairs or supplies are necessary to enable her to return to the home port.[2]

The general doctrine in admiralty is that the court has jurisdiction in cases of actions for supplies or material furnished, only where they are furnished to a foreign vessel.[3] But supplies or materials furnished in one state to a vessel belonging to another state are considered as furnished to a foreign vessel lying in a foreign jurisdiction, the different states being for this purpose held as foreign to each other.[4]

§ 45. **Suits on bottomry bonds.**—Suits on bottomry-bonds property, so called, must be *in rem* only, against the property hypothecated, or the proceeds of such property in whosesoever hands they may be found, unless the bond was given without authority by the master, or by his fraud or misconduct he has avoided the same or has subtracted the property, or unless the owner has by his own misconduct or wrong lost or subtracted the property, in which latter cases the suits may be *in personam* against the wrongdoer.[5] And an assignee of the bond may either sue in his own name on the bond or he may sue in the name of the assignor;[6] and the court will entertain jurisdiction of a suit on such a bond executed in a foreign country, and between subjects of a foreign country, where the ship is within the territory of the United States.[7]

§ 46. **Suits for salvage.**—In suits for salvage the proceedings may be *in rem* against the property saved or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service was performed.[8] The libel may be filed

[1] The Grapeshot, 9 Wall. 129; The Lulee, 10 Wall. 192; The Patapsco, 13 Wall. 329; The Neversink, 5 Blatch. 539; The John and Alice, 1 Wash. 293; The Aurora, 1 Wh. 96; The Fortitude, 3 Sum. 234; The Virgin, 8 Pet. 554.

[2] Crawford *v.* The William Penn, 3 Wash. 484.

[3] The Jerusalem, 2 Gallis. 349; Burk *v.* The Brig M. P. Rich, 1 Cliff. 308; The Nestor, 1 Sum. 73; The Sandwich, 1 Pet. Ad. 233.

[4] The Chusan, 2 Story 455; Whitlock *v.* The Thales, 20 How. Pr. 447: The Charles Mears, Newb. 197; The Nestor, 1 Sum. 73.

[5] Adm. Rule 18.

[6] Burk *v.* The M. P. Rich, 1 Cliff. 308.

[7] The Jerusalem, 2 Gall. 190; The Packet, 3 Mas. 255.

[8] Adm. Rule 19; McGinnis *v.* Pontiac, 5 McLean 359; The Centurion, Ware 447.

in the name of the master and owners of the salving vessel, although the master may make no claim on his own behalf.[1] It matters not what are the methods or means pursued to save a vessel or cargo from destruction or loss, the salvors may claim a lien therefor on the property saved or its proceeds. Thus, where a vessel took fire in a harbor, and a tug towed fire engines, commonly used on land, and lay alongside the burning vessel while the engines threw water upon her and extinguished the fire, the owners of the tug were held to be entitled to salvage, although the representatives of the fire department directed the towing to be done, and made no claim for salvage.[2] A corporation may be entitled to salvage as well as a natural person;[3] and the property of the United States may be subject to a lien for salvage.[4] The lien exists upon the property saved, and it requires the most unequivocal acts on the part of the salvors to indicate an abandonment of the lien, so as to defeat the enforcement of the same, and compel them to resort to a suit *in personam* against the owners for payment;[5] but salvors cannot in the same libel proceed *in rem* against the vessel and *in personam* against the consignees of the cargo.[6]

§ 47. **Petitory and possessory suits.**—It is provided by rule that "in all petitory and possessory suits between part owners or adverse proprietors; or by the owners of a ship, or the majority thereof, against the master of a ship for the ascertainment of the title and delivery of the possession, or for the possession only; or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent; or by one or more part owners against the others to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit."[7]

Where two persons were equal joint owners of a vessel, but one of them was in possession as ship's husband, who left her in an unsafe condition with no person on board, and the other half-owner took possession of her, on an application by the former for her pos-

[1] The Blackwall, 10 Wall. 1.
[2] The Blackwall, 10 Wall. 1.
[3] The Camanche, 8 Wall. 448.
[4] The Davis, 10 Wall. 15.
[5] Eads *v.* The H. D. Bacon, 1 Newb. Ad. 274.
[6] The Sabine, 101 U. S. 384.
[7] Adm. Rule 20.

session, the court refused to interfere.[1] Under the provisions of the rule last cited, where the owner of a one-fourth part of a whaleship gave notice to the owners of other parts of her that he would not pay anything for the outfits of a whaling voyage contemplated by the latter, but did not in distinct terms dissent from the voyage or apply for security for a return of his share in said ship until she was nearly ready to sail, on a libel filed by him it was held that he was entitled to security by stipulation for the return thereof, and that the return should be to the port of New Bedford, to which she belonged, as it did not appear that the other owners had been misled or subjected to any loss by the delay in making application for security.[2]

The question of title and ownership, as well as the right of possession of vessels, may be determined by a petitory action;[3] but a mere equitable title is not sufficient to justify an interference of a court of admiralty to give possession of a vessel against the legal title, as possession must follow the legal title.[4]

For form of process for the arrest of a vessel in such cases, see *post*, Form No. 112.

§ 48. **Suits for mariners' wages.**—A contract for mariners' services is a maritime contract, and in suits thereon in admiralty the libellant may proceed against the ship, freight and master, or against the ship and freight; or against the owner alone, or the master alone, *in personam*.[5]

Where a ship is engaged in an unlawful trade, or sails on an illegal voyage, and she is seized and a forfeiture claimed therefor by the government, if the seamen or material-men are innocent of all knowledge thereof or of participation therein, their claims for wages or material will be preferred to the claims of forfeiture by the government;[6] but a master has no lien on the ship for his wages by the general maritime law, although he may maintain a suit

[1] The Ocean, 1 Sprague 535. A stipulation filed to secure the release of a vessel is not a waiver of the rights of the principal to question the original liability of the vessel: The Fidelity, 16 Blatch. 569.

[2] The Marengo, 1 Sprague 506.

[3] Ward *v.* Peck, 18 How. 267; The Tilton, 5 Mas. 465; Gregg *v.* The Clarissa Ann, 2 Hughes 89; The Friendship, 2 Curt. 426.

[4] The Amelia, 6 Ben. 475; Kynoch *v.* Ives, Newb. 205; The William D. Rice, 3 Ware 134; The Perseverance, 1 Bl. & H. 385.

[5] Adm. Rule 13.

[6] The St. Jago De Cuba, 9 Wh. 409; The United States *v.* Robertson, 5 Pet. 675; The Langdon Cheves, 2 Mas. 58.

in admiralty, *in personam*, for wages, or for compensation in the nature of wages.[1]

The lien for seamen's wages attaches not only to the ship, but to the freight, and they have a priority of all other claims; and in case of loss the-ship owners are liable therefor.[2] The lien of seamen for wages takes precedence even over bottomry bonds and all other claims or liens, whether the entirety of the fund out of which they should be paid remains or a part of it is lost; and this right extends to the last fragment of the freight, and is "nailed to the last plank of the ship;" and it cannot be affected by any private contract between the owner of the ship and the shippers.[3]

If a portion of a wrecked vessel is saved by the exertions of the seamen and brought into port and sold, they have a lien on the proceeds for their wages.[4] They, like material-men, have a triple security for their wages, namely, the vessel, the owner and the master. The owner is liable, although his name does not appear in the shipping articles; and if a sale of the vessel is made subsequent to the making of the shipping articles, this will not discharge the liability of the owner, even though the voyage was not terminated, and even though the ship be lost; in which latter case they are entitled to wages until discharged.[5] If, however, in case of a wreck they abandon the ship, they lose their lien upon it, and are not restored by the *jus postliminii* on the salvage of the property of other persons.[6] But they would not lose their claim for a lien by taking an order on the charterer for their wages.[7] They are entitled to the lien from the time the contract is entered into, and while the ship is getting ready to sail, though she may never leave the port.[8]

§ 49. **Suits for pilot's wages.**—The right of a pilot is more limited than that of a seaman, by a rule of admiralty, if not by the general

[1] The Steamboat Orleans, 11 Pet. 175; Hammond *v.* The Essex Fire Insurance Co., 4 Mas. 196; Willard *v.* Dorr, 3 Mas. 91.

[2] Brown et al. *v.* Lull, 2 Sum. 443.

[3] Pitman *v.* Hooper, 3 Sum. 50.

[4] Brackett et al. *v.* The Hercules, Gilp. 184.

[5] Bronde *v.* Haven, Gilpin 592. See also The Brig Blohm, 1 Ben. 228, where under a contract made in Hamburg seamen were allowed, out of a fund produced by a sale of the ship in New York, the voyage not being completed, but they being discharged, two months extra pay.

[6] Lewis *v.* The Elizabeth and Jane, 1 Ware 41. A person hired by a captain of a vessel to act as nominal captain is entitled to the wages agreed upon, and the vessel and owner are liable therefor: L'Arina *v.* Brig Exchange, Bee's Adm. 198; Same *v.* Manwaring, Id. 199.

[7] The Eastern Star, 1 Ware 185.

[8] The Island City, Low. Dec. 375.

principles of admiralty practice. In the case of a seaman, he may enforce his lien for wages even against the freight; but in suits for pilotage, the libellant can only proceed against the ship and master, or against the ship or against the owner alone, or the master alone *in personam*.[1]

§ 50. **Jurisdiction in case of torts.**—In respect to jurisdiction in admiralty depending upon locality in case of tort, by the general principles of the admiralty law the tort must have been committed upon the high seas, or at least within the ebb and flow of the tides.[2] But Congress, by the judiciary act of 1789, gave the district courts jurisdiction in admiralty, in certain cases, over fresh waters navigable from the sea with vessels of ten tons burden and upwards;[3] and an act of February 20, 1845, gave them "the same jurisdiction in matters of contract and tort arising in, upon or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and employed in commerce and navigation upon the lakes and navigable waters connecting them, as is possessed by those courts in cases of the like vessels employed upon the high seas or tide waters, within admiralty or maritime jurisdiction."[4]

The provisions of these acts do not appear to be incorporated into the Revised Statutes, by any positive declaration of jurisdiction of the district courts in such cases; but such jurisdiction may well be inferred from a provision of section 566 of said statutes, which is as follows: "In causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories, upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it."

In the absence of any positive statutory provision conferring jurisdiction on these courts, or extending their jurisdiction in admiralty over waters not within admiralty jurisdiction as limited

[1] Adm. Rule 14; The Anne, 1 Mas. 507; The Wave, 7 Leg. Obs. 97; Logan *v.* The Eolian, 1 Bond 267.

[2] Waring *v.* Clark, 5 How. 441; The Genesee Chief, 12 How. 443.

[3] New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344; The Almeida, 10 Wh. 473; The Belfast, 7 Wall. 624; Peyron *v.* Howard, 7 Pet. 324.

[4] Stat. at Large, C. 20, V. 5, p. 726.

by the English law, it has been maintained by very cogent arguments that they may exercise admiralty jurisdiction over the lakes and rivers of the country navigable for the purposes of trade and commerce between states, or between one of the states and a foreign state. The admiralty jurisdiction of the English courts is limited locally to the sea or to waters therewith connected where the tides ebb and flow. The ebb and flow of the tides there is the test of navigability for the purposes of carrying on trade and commerce with foreign states. But it is different in this country. The ebb and flow of the tides here is not the test of navigability of our lakes and rivers to aid commerce between states or with foreign states. Hence it has been held that this limitation and doctrine in the English admiralty law has no proper application in this country, and that the admiralty jurisdiction of the district courts properly extends "wherever vessels float and navigation successfully aids commerce, whether internal or external."[1] In view of these broad and enlightened views of the highest federal tribunal, and taking into consideration the provision of the Revised Statutes above referred to, giving a right of trial by jury in such cases, it may well be inferred that Congress assumed that these courts possessed adequate powers in such cases, without a direct legislative declaration to that effect. The question in such a case as to the navigability of rivers and lakes for the purposes aforesaid would be one of fact, and the jurisdiction would be limited to vessels engaged in foreign commerce, or commerce between states, and would not ordinarily extend to the internal commerce of a state, or to the enforcement of state laws relating to internal commerce.[2]

§ 51. **Suits for collisions.**—By a rule of court, in a suit for damage caused by a collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or owner *in personam*.[3]

If a libel is filed for damage caused by a collision in a foreign port, the rights of the parties would be governed by the law of the country where the collision occurred; and if doubts exist as to the

[1] The Hine, 4 Wall. 555; The Genesee Chief, 12 How. 443; The Moses Taylor, 4 Wall. 411; The Eagle, 8 Wall. 15; The Steamboat Co., 16 Wall. 522.

[2] Maguire *v.* Card, 21 How. 248. An exception to this doctrine may however arise in cases of claims for salvage: Allen *v.* Newberry, 21 How. 244.

[3] Adm. Rule 15.

true construction of the law, resort may be had to the construction made by the courts in the foreign country. This doctrine is consonant with the general principles of the law, and was followed in this country in a case of libel for damages occurring in an English port.[1]

§ 52. **Libel against the vessel and master.**—By the provisions of the rule last cited, the proceeding in admiralty for a collision may be *in rem* against the vessel, and *in personam* against the master, and these remedies may be joined in one proceeding;[2] or it may be against the ship alone; or it may be against the master or owner alone *in personam*. But the rule does not authorize a proceeding against the ship *in rem* and personally against the owner at the same time.[3]

Where the loss from collision arises from the negligence of the master and crew, the master is liable as well as the ship.[4] Under the present rule the remedy might be against both jointly, and they would not be exempted from liability if, even after a wreck caused by a collision, a portion of the cargo is injured or lost through efforts of another vessel to save it.[5]

§ 53. **Assault and battery.**—In suits for assault and battery committed upon the high seas, or elsewhere within the admiralty and maritime jurisdiction of the district courts, the proceeding can be only *in personam*.[6] There is a different rule, usually applicable to the deportment of persons to each other on land, from that which obtains on board a ship. The authority of officers must be respected on the latter, and they are authorized to punish for disobedience. But a seaman may recover damages for an assault and battery inflicted wantonly and without cause by an officer; or where, although a punishment is inflicted for a provocation and just cause, it is done in a cruel or excessive manner, or where it is inflicted with a dangerous or deadly weapon.[7]

So the master is liable for an unjustifiable assault and battery by one of his officers upon one of the crew, where it is done by his direction or command, connivance or consent; and these will be

[1] Smith *v.* Condry, 1 How. 28.

[2] Newell *v.* Norton and Ship, 3 Wall. 257.

[3] The Atlantic and Ogdensburg, 1 Newb. Adm. 139; Ward *v.* The Ogdensburg, 5 McLean 622.

[4] Hale *v.* Wash. Ins. Co., 2 Story 176.

[5] The Narragansett, Ole. 246.

[6] Adm. Rule 16; Thomas *v.* Lane, 2 Sum. 1. The jurisdiction of the court depending upon locality should appear from the libel: Id.

[7] Forbes *v.* Parsons, Crabbe 288.

presumed where he had knowledge of it and did not interfere to prevent it.[1]

The authority of the master or captain of a vessel to punish seamen for disobedience ends, it seems, with the voyage; and if an offending seaman is afterwards taken again on board, the officer cannot thereafter punish or assault and beat him for an offence committed before he discharged him.[2]

§ 54. **Injury to passengers.**—The admiralty jurisdiction of the district courts extends to assault and battery of passengers as well as to seamen, and they may recover damages for willful and wanton injuries, whether they are the result of direct force or merely consequential and indirect, as where a passenger has been subjected to gross ignominy and mental suffering by the brutal maltreatment and insults of the master of the vessel. It extends to every species of torts and wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law would be an action on the case.[3]

[1] Hanson *v.* Fowle, 1 Saw. (C. C.) 539.
[2] Roberts *v.* Dallas, Bee's Adm. 239.
[3] Chamberlain *v.* Chandler, 3 Mas. 242; Phila., W. & B. R. Co. *v.* Towboat Co., 23 How. 209; The Plymouth, 3 Wall. 20; The New World *v.* King, 16 How. 469; The Eagle, 8 Wall. 15.

CHAPTER VI.

PLEADING AND PRACTICE IN ADMIRALTY.

§ 55. **General principles.**—The general rules, principles and modes of procedure which obtained in the English courts of admiralty and maritime jurisdiction at the inception of our government are substantially applicable to our federal courts of admiralty and maritime jurisdiction. These have in some cases been changed or modified by acts of Congress, and regulated by rules prescribed by the Supreme Court, and by local rules of the courts in the various districts.[1] But the exercise of powers and usages by the district courts, generally recognized as belonging to courts of admiralty and maritime jurisdiction, cannot be restrained by mere rules of court.[2]

§ 56. **The libel.**—The first pleading on the part of the libellant or party instituting proceedings on the admiralty side of the court is the libel, which should contain a clear statement of the material facts of the case in distinct articles or paragraphs, consecutively numbered—of the wrongs done for which he claims damages, and the grounds on which he bases his claims to property, with such sufficient fullness and precision as to enable the defendant to answer distinctly each material averment; and it should especially contain averments which bring the case within the admiralty jurisdiction of the court.[3] The pleadings in admiralty are simple and untechnical, and in this respect they correspond more closely with pleadings in equity than those of the common law.

§ 57. **Process cannot issue until the libel is filed.**—No mesne process can issue in any civil cause of admiralty or maritime jurisdiction until the libel or libel of information is filed in the office of the clerk of the court from which relief is sought. And all process must be served by the marshal or his deputy, or, where they are

[1] Manro *v.* Almeida, 10 Wh. 473; United States *v.* The Little Charles, 1 Brock. 380; Jennings *v.* Carson, 4 Cr. 2; Adm. Rule 46; Beers *v.* Haughton, 9 Pet. 329.

[2] Gates *v.* Johnson, 11 L. Rep. N. S. 279.

[3] The Boston, 1 Sum. 328; Talbot *v.* Wakeman, 19 How. Pr. 36; Dupont *v.* Vance, 19 How. 162; The Adaline, 9 Cr. 244; Thomas *v.* Lane. 2 Sum. 1; Orne *v.* Townsend, 4 Mas. 541; Treadwell *v.* Joseph, 1 Sum. 390; The Washington, 4 Blatch. 101.

interested, by some discreet and disinterested person appointed by the court.[1] The process must be directed to the marshal or his deputy, or, where he or they are interested, to some discreet and disinterested person appointed by the court; and it cannot be served by a private person, although by the laws of the state original process may be so served.[2] For form of citation in such case, see *post*, No. 124.

§ 58. **The mesne process.**—In suits *in personam*, the mesne process may be by a simple warrant of arrest of the person of the defendant in the nature of a *capias*, or warrant of arrest of the person of the defendant, with a clause therein that, if he cannot be found, his goods and chattels be attached to the amount sued for; and if such property cannot be found, his credits and effects be attached to the amount sued for in the hands of garnishees named therein, or by a simple monition in the nature of a summons to appear and answer to the suit, as the libellant shall in his libel or information pray for or elect.[3]

For appropriate forms in such cases, see *post*, Nos. 123, 137.

§ 59. **Several claims for damages.**—If several claims for damages are united in one libel, it would seem advisable to state the facts of each separately in a distinct article or paragraph, as otherwise the defendant might not be able to make a proper answer and it would be subject to exception.[4] If the libel is for damages for an assault and battery, it is sufficient to set forth the facts constituting the offence; but if it is designed to recover for several distinct and separate torts of this kind, it is desirable, if not necessary, to set them out distinctly in separate and distinct *articles*, in order that proper evidence may be offered in support of them, as it is a general rule in admiralty as well as at law and in equity, that the proofs must be confined to and follow the allegations of the pleadings.[5] Under a rule, however, prescribed by the Supreme Court, amendments in pleadings in admiralty may be made in matters of form, on a mere motion to the court, as of course, in matters in substance, upon motion at any time before a decree, upon such terms as the court shall impose. But evidence variant from the pleadings will

[1] Adm. Rule 1.

[2] Schwabacker *v.* Reilly, 2 Dill. 127; The United States *v.* The Little Charles, 1 Brock. 380.

[3] Adm. Rule 2.

[4] Treadwell *v.* Joseph, 1 Sum. 390.

[5] McKinlay *v.* Morrish, 21 How. 343; Kramme *v.* The New England, Newb. 481; Campbell *v.* The Uncle Sam, 1 McAll. 77.

not furnish grounds for excluding it, unless it is calculated to mislead.[1]

For various forms of libel, see *post*, Nos. 110–121.

§ 60. **Suits against the ship's tackle, etc.**—In case of proceedings against a ship, her tackle, sails, apparel, furniture, boats or other appurtenances, if such tackle, sails, apparel, furniture, boats or other appurtenances are in the possession of any third person, the court may, after the filing of the libel, issue a monition to such person to show cause, if any, why the same should not be delivered to the marshal, and the court may upon the hearing, if any, award and decree that the same be delivered into the custody of the marshal if it appears to be required by law and justice.[2]

For forms of bond or stipulations for costs, order for process, and forms of process of various kinds, see *post*, Nos. 127, 128, 129, 130, and 136–138.

§ 61. **Order for process to issue; stipulation for costs.**—There does not appear to be any positive statutory provision or rule prescribed by the Supreme Court requiring the libellant to give security for costs; but this is perhaps generally required by rules adopted by the various district courts. Nor is there any statute or rule requiring the issuance of process, but the practice is to obtain an order of the judge for the proper process to issue; and this is especially required where the suit is *in personam*, and a warrant of arrest either of the person or property is asked, for a sum exceeding five hundred dollars.[3] For a form of order in such a case, see *post*, No. 136.

It is further provided by rule that bonds and stipulations in admiralty suits may be given and taken in open court or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail or depositions in cases pending before the court or any commissioner of the United States authorized to take bail and affidavits in civil cases.[4]

The stipulation should be signed by the libellant and the sureties, and be acknowledged before the proper officer, who should require a justification by affidavit on the part of the surety. If, however, there is a defective stipulation filed with the clerk, the

[1] Adm. Rule 24; Crawford *v.* The William Penn, 3 Wash. 484; The Clement, 2 Curt. 363.

[2] Adm. Rule 8. See also, as to attachments or replevin of property, Certain Logs of Mahogany, 2 Sum. 589.

[3] Adm. Rule 7.

[4] Adm. Rule 5.

defect will be deemed waived unless excepted to by the party interested therein before the close of the term of court next subsequent to its becoming known to him.[1]

§ 62. **New sureties, when required; bail reduced.**—It is further provided by rule that in all suits *in personam*, where bail is taken, the court may on motion therefor reduce the amount of the bail; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as provided by the rules, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court, to be given upon due proof thereof.[2]

§ 63. **In case of contracts or torts, may attach.**—The district courts have, as we have observed, jurisdiction of maritime contracts and torts, and of suits *in personam* as well as *in rem*. If the suit is *in personam*, the court may issue a process of arrest which may contain an attachment clause, and if the defendant has absconded or cannot be found within the jurisdiction of the court, the property of the defendant may be attached; and in case of default, the attached property may be condemned to answer the claim of the libellant. If property of the defendant cannot be found, the credits and effects of the defendant in the hands of the third parties may be garnisheed.[3] The primary object in all such cases is to secure the appearance of the defendant in the suit, and not the arrest of the property.

§ 64. **When attachments may be dissolved.**—When property is attached in a suit *in personam*, under a warrent authorizing the same, the attachment may be dissolved by order of the court to which the warrant is returnable, by the giving of a bond or stipulation by the defendant, with sufficient sureties, to abide by all orders of the court, interlocutory or final, and to pay the amount awarded by the final decree rendered by said court or any appellate court; and execution may issue against said principal and sureties from either of said courts, to enforce a final decree rendered therein.[4] The bond in such a case becomes a substitute for the property seized, and the question as to the right to subject the property to the claim of the

[1] Abb. Adm. 327; Sawyer *v.* Oakham, 11 Blatch. C. C. 65.

[2] Adm. Rule 6.

[3] Adm. Rule 2; Manro *v.* The Almeida, 10 Wh. 473; McGrath *v.* The Candalero, Bee's Adm. 64; Bouyson *v.* Miller, Id. 186; Reed *v.* Hussey, 1 Blatch. & H. 525; Mankin *v.* Chandler, 2 Brock. 125.

[4] Adm. Rule 4.

libellant must be determined before a final decree can be rendered on the bond, either by the district court or the circuit court on appeal, and the Supreme Court cannot review this question. And if such a bond or stipulation is given by a member of a firm, at their request and for their benefit, this bars a suit against the other partners.[1]

§ 65. **When the marshal may take bail; summary process.**—It is further provided by rule, that "In all suits *in personam* where a simple warrant of arrest issues and is executed, the marshal may take bail with sufficient sureties from the parties arrested, by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in the appellate court. And upon such bond or stipulation summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable to enforce the final decree so rendered, or upon appeal by the appellate court."[2]

It is not sufficient under this rule, in order to release the party in custody, that he give a stipulation for costs on the return day of the process, but he is required to give a bond or stipulation to satisfy any decree which may be rendered against him in the suit, and until this is done he cannot be discharged from arrest.[3] Where the condition of the bond provided that the parties would perform the decree of the court, etc., it was held that this meant the court that should ultimately decide the case.[4] But the court will not suffer a party to be held to bail in two places at the same time, for the same cause of action.[5]

When a decree is rendered against the principal in the bond or stipulation, execution may properly issue against the stipulators, upon the decree rendered, as well as against the principal.[6]

For various forms of bonds or stipulations in such cases, see *post*, Nos. 111, 114, 128, 129, 130.

§ 66. **When a warrant of arrest cannot issue.**—It has already been incidentally observed that no warrant of arrest, either of the person

[1] United States *v.* Ames, 99 U. S. 35.

[2] Adm. Rule 3.

[3] Gardner *v.* Isaacson, Abb. Adm. 141.

[4] The U. S. *v.* Little Charles, 1 Brock. C. C. 380.

[5] Bingham *v.* Wilkins, Crabbe 50.

[6] Gaines *v.* Travers, Abb. Adm. 422.

or property of the defendant, in suits *in personam*, can issue for a sum exceeding five hundred dollars, unless by special order of the court, upon affidavit or other proper proof, showing the propriety thereof.[1]

§ 67. **The claim; pleading of a claimant in proceedings in rem.**—A person who claims the property involved in a proceeding *in rem* may, by a sort of pleading called a claim, intervene in the suit and have his right to the same adjudicated in the same suit. He may obtain the property, in the first instance by depositing in court so much money as the court shall order, or by giving a stipulation with sureties, after an appraisement of the property, in such sum and on such conditions as the court may direct. The court on the hearing may adjudge the property to him, or that he receive the balance of its proceeds after satisfying any decree in favor of the libellant, as the case may require.[2] For forms of claims see *post*, Nos. 113, 118.

§ 68. **Where the property arrested is owned by several or jointly.**—It frequently occurs that property arrested by proceedings in admiralty is owned by several parties, as, for instance, a vessel or its cargo, in which latter case there might, and usually would, be several owners of it. In such a case it seems to be the practice to allow one of them to make a claim on behalf of himself and the other owner or owners; but, where the property interests are distinct, it is required by the general principles of admiralty practice that the claims be set up by each of the several owners. Between such parties there is no priority of interest, and their interests are, therefore, independent matters of adjudication. Several parties owning distinct parts of a cargo, separately may interpose in case of a libel for salvage, although the libel is against the whole, and the claims of the several parties would be adjusted in the one proceeding, as if it had been a distinct proceeding against the particular property of each owner. And in case any particular part of the property arrested is not claimed, it is the practice of the court to retain possession of it for at least a year and a day from the time the proceedings are instituted, unless some claimant sooner appears.

[1] Adm. Rule 7; Marshal *v.* Bazin, 7 N. Y. Leg. Obs. 342.

[2] Conk. Adm. 203, and notes; Adm. Rule 10, 11. But a stipulation filed to release a vessel is not a waiver of the question of original liability: The Fidelity, 16 Blatch. 569.

As a general rule the claimant is required to intervene on the return day of the process, and then be ready to file his *claim* in court; and in case of failure so to do, or of the defendant to appear and answer by that time, the libel may be taken *pro confesso;* but it is usual to allow a reasonable time thereafter to the defendant to prepare an answer, where he applies for further time.[1]

Sometimes the claim of proprietory right is joined with an answer, and called a claim and answer; but as the right of a claimant in court rests upon his right of property or that of his principal, and this alone gives him a right to interpose a claim, it has been considered the better practice to put in the claim separately.[2]

§ 69. **The claim must be verified; stipulation for costs.**—It is required by a rule of practice in admiralty prescribed by the Supreme Court that, "in suits *in rem*, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and *bonâ fide* owner, and that no other person is the owner thereof. And where the claim is made by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner." The claimant in such a case is required to file a stipulation with sureties in such sum as the court may direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or upon an appeal by the appellate court.[3] For forms of claims, see *post*, Nos. 113, 118, 122.

§ 70. **When the ship will be delivered to a claimant.**—If any ship shall be arrested, it may, upon the application of a claimant, be delivered to him upon an appraisement had under the direction of the court, and upon his depositing in the court so much money as the court shall order; or upon his giving a stipulation, with sureties in such sum as the court shall direct, to abide by and pay the money that may be awarded by the final decree rendered by the court, or the appellate court if an appeal intervenes, as the one or the other course shall be ordered by the court; and if the claimant shall fail to make such application, then the court may, on the application of either party, upon due cause shown, order a sale of

[1] Conk. U. S. Adm. 303 *et seq.*; Adm. Rule 29.

[2] Id.

[3] Adm. Rule 26.

the ship which has been arrested, and the proceeds thereof to be brought into court, or otherwise disposed of it as it may deem most beneficial for all concerned.[1]

§ 71. **Stipulation by one of the owners of a vessel.**—The appraisement provided for by the rules of court on an application for the delivery of a ship to a claimant as aforesaid is conclusive upon the party to whom it is delivered upon such an application. He cannot afterwards insist that the ship was of less value than that at which it was appraised; nor can he be held beyond this appraised value, or show that he had discharged other liens, diminishing the amount for which he was personally liable in the first instance.[2]

§ 72. **Perishable goods sold.**—If the goods or other things arrested are perishable or liable to deterioration, decay or injury by detention in the custody of the marshal pending the suit, the court will, upon the application of either party, in its discretion, order the same or so much thereof as shall be perishable or liable to depreciation, decay or injury by detention, to be sold, and the proceeds, or so much thereof as shall be sufficient to satisfy any decree which may be rendered in the case, to be brought into court to abide the event of the suit; or the court may, upon the application of a claimant, order a delivery thereof to him, upon due appraisement to be had under its direction, either upon the claimant depositing in court so much money as the court shall order, or upon his giving a stipulation with sureties, in such sum as the court shall direct, to abide by and pay the money awarded by the final decree which may be rendered by the court, or the appellate court if an appeal is taken, as the one or the other course is ordered by the court.[3]

It is not a matter of absolute right in such cases for either party to have a delivery of property on bail; but if a ship is liable to be injured by a delay during a suit for salvage or the cargo to deteriorate, it is proper to apply to the court for a sale thereof; and if, on a proper showing of facts, it would appear to be for the interest of all parties concerned, the court should order the sale.[4] In case of appeal the *thing* does not follow the appeal to the higher court, but

[1] Adm. Rule 11.

[2] The Virgin, 8 Pet. 538. But the giving of a stipulation waives no rights of the stipulator in reference to original liability: 16 Blatch. 569.

[3] Adm. Rule 10.

[4] The Nathaniel Hoper, 3 Sum. 543. See also The Cheshire, Blatch. Pr. Cas. 165; The Elly Warley, Id. 213.

remains in the court below, which may thereafter order a sale of the property on a proper application and showing as aforesaid.[1]

§ 73. **Where a state court has acquired jurisdiction.**—The district courts will not interfere in a proceeding *in rem* with property properly in the custody of a state court. The tribunal having jurisdiction, and first exercising it in such a case, may proceed without the interference of the other. Thus, if a party attaches a vessel by a process issued from a state court, and under the statutes of a state providing for such a proceeding, to secure a claim for material furnished, and a libel is subsequently filed by another person in a district court to enforce a lien for material furnished to repair the same vessel, the attachment issued from the state court would have priority over that of the federal court, and the plaintiff in the former suit could not be prejudiced by the latter.[2]

§ 74. **Information and libel on seizures.**—It is required that "all informations and libels of information upon seizures for any breach of the revenue or navigation, or other laws of the United States, shall state the place of seizure, whether it be on the land or the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought, and where it then is."[3] It is further required that the information or libel of information "propound in distinct articles the matters relied on as causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such cases provided as the case may require;" and it must "conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return day of the process why the forfeiture should not be decreed."[4]

It is necessary that the information or libel information should aver specially all the facts constituting the offence charged; and a general reference to the provisions of the statutes claimed to have been violated is not sufficient.[5] But liberal provisions are made for

[1] Jennings *v.* Carson, 4 Cr. 1.

[2] The Fulton, 1 Paine 520. See also Hine *v.* Trever, 4 Wall. 55; s. c., 17 Id. 349; Leon *v.* Galcerean, 11 Wall. 185; Donnell *v.* The Starlight, 103 Mas. 227.

[3] Adm. Rule 22.

[4] Id.

[5] The Caroline *v.* United States, 7 Cr. 496; The Happet and Cargo *v.* United States, 7 Cr. 389; The Margaret, 9 Wh. 421. There must be certainty, in case several illegal acts are charged, as to which constitutes the offence: The Caroline, 1 Brock. 384.

amendments,[1] and an informal libel or information may be amended by leave of the court. And where a suit was brought against a vessel and master jointly, to recover a penalty for importing goods which were not included in the manifest, it was held proper to dismiss the suit as to the master, as he would be entitled under the statute to a jury trial, and proceed against the vessel *in rem*.[2]

It is manifest from the provisions of this rule that the owner of the libelled property may be represented by another in the presentation of the claim. Thus while the ship against which the proceedings are instituted is at the time of the arrest in the possession of the master of the ship, he may put in the claim as bailee, for the owner, and verify it.[3]

Such claim and verification is by no means conclusive of the right of property, but only enables the claimant to controvert the claims of the libellant and allows him by proofs to establish his rights thereto. If it should, however, appear on the trial that his claim was not well founded, whether the claims of the libellant were established or not, and that some other party not represented by the claimant was the owner, or had an adverse interest in it, the court would retain the property, and allow him an opportunity to claim it.[4]

§ 75. **How decrees may be enforced.**—The final decree of the district court in admiralty for the payment of money may be enforced by a writ of execution, to which the libellant is entitled, in the nature of a *fieri facias*, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other estate of the defendant or his stipulators.[5]

The execution issues summarily against stipulators, upon a decree being rendered against the principals, the execution of the stipulation by them being regarded as an agreement to submit to such decrees as may be entered against those for whom they have become thereby bound.[6] For form of execution, see *post*, Nos. 135, 146.

§ 76. **Prize causes.**—The district courts have exclusive cognizance of all prize causes, except as provided by paragraph six of

[1] Adm. Rule 24.
[2] The United States *v.* The Steamship Queen, 11 Blatch. 416.
[3] Adm. Rule 26, see *post*.
[4] Conk. Adm.
[5] Adm. Rule 21.
[6] Gaines *v.* Travis, 1 Abb. Adm. 422; The Blanche Page, 16 Blatch. 1.

section 629 of the Revised Statutes,[1] which also confers concurrent jurisdiction upon the circuit court, in proceedings to condemn property taken as prize which is used or intended to be used to aid any insurrection.[2]

In the adjudication of these cases they may decree a restitution of the whole or a part of the captured property, and they may decree damages against the captors, where the capture was wrongful and without probable cause;[3] and if the seizure was not only illegal, but a gross and wanton outrage, the court is not limited, in its decree of damages against the captors, to the actual pecuniary loss sustained by the seizure, but may, in analogy to the doctrine of the common law relating to damages for willful outrage and oppression, give such damages to the injured party as will compensate for the mental suffering and humiliation which may have been sustained thereby, or damages of a punitive or exemplary character.[4]

By the general principles of the admiralty law, seizures must be made upon the high seas, or on contiguous waters where the tide ebbs and flows;[5] but the section under consideration confers exclusive jurisdiction on the district courts in all cases where the seizure is made on land, or on waters not within admiralty jurisdiction, except in cases of proceedings for the condemnation of property captured under a claim that it was used or intended to be used in aid of an insurrection against the government of the United States, in which latter case the circuit courts have also jurisdiction.[6]

§ 77. **In cases of seizure; process.**—In all cases of seizure, and in other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, must be by warrant of arrest of the ship, goods or other things to be arrested; and the marshal is thereupon required to arrest and take the ship, goods or other thing into his possession for safe custody; and it is his duty to give public notice thereof, and of the time assigned for the return of such process and the hearing of the cause, in such newspaper within the district as

[1] Rev. Stat. § 629, par. 6; Id. par. 9.

[2] Rev. Stat. § 629; sub. 6; Id. § 5308.

[3] Glass *v.* Sloop Betsey, 3 Dall. 6 (1793); Penhallow *v.* Doan, 3 Dall. 54; Talbot *v.* Janson, 3 Dall. 133; Bingham *v.* Cabot, 3 Dall. 19; Jennings *v.* Carson, 4 Cr. 2; Bowen *v.* United States, 8 Cr. 110; The Estella, 4 Wh. 298; The Siren, 7 Wall. 152.

[4] The Amiable Nancy, 3 Wh. 546; The Siren, 7 Wall. 162; The Brig Alerta *v.* Moran, 9 Cr. 359; The Estella, 4 Wh. 307; Keene *v.* The United States, 5 Cr. 304; United States *v.* Schooner Sally, 2 Cr. 406.

[5] The Sarah, 8 Wh. 391; Id. 1 Pet. 549.

[6] Rev. Stat. § 563, sub. 8; Id. 629, sub. 6; Id. 5308.

the court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.[1] For appropriate form in such cases see *post*, No. 158.

§ 78. **Condemnation of property employed in aid of insurrection.**—The statutes provide for the seizure and condemnation as prize of any property used or intended to be used in aid of any insurrection against the government of the United States;[2] and, as we have seen, both the circuit and district courts have cognizance of such causes.[3] This provision of the Revised Statutes is a substantial re-enactment of the provisions of the act of Congress of August 6, 1861, under which it was determined that it covered all descriptions of property both real and personal, whether on land or water; that the proceedings under the act for condemnation of real estate or other property on land should be shaped in conformity with the general practice in admiralty cases; and that the issues of fact in such cases should, on the request of either party, be submitted to a jury.[4]

§ 79. **Authority of the court over funds derived from confiscated property.**—The proceeds of confiscated property paid into court are under its control until they are distributed pursuant to a final decree in the cause; and if they are withdrawn without authority of the court, it can by summary proceedings compel their restitution.[5]

§ 80. **Distinction between instance and prize causes.**—The distinction between the instance and prize side of the court, in the exercise of admiralty jurisdiction, is clear and important to be observed. In the former case the power of the court rests upon the statutes, in the latter upon the general principles of the common law, relating to admiralty practice and procedure. Hence, if the records show that the case is on the instance side of the court for a forfeiture under a statute, the property sought to be condemned cannot be condemned as prize; and if it shows a proceeding for the

[1] Adm. Rule 9.
[2] Rev. Stat. § 5308.
[3] Rev. Stat. § 563, par. 9, and § 629, par. 6.
[4] Union Ins. Co. *v.* United States, 6 Wall. 759. See also The Vengeance, 3 Dall. 297; The Sarah, 8 Wh. 394.
[5] Osborne *v.* United States, 91 U. S. 474. See also Morris' Cotton, 8 Wall. 507; Mrs. Alexander's Cotton, 2 Wall. 404; Union Ins. Co. *v.* United States, 6 Wall. 759; Armstrong's Foundry, 6 Wall. 766; United States *v.* Shares of Capital Stock, 5 Blatch. 231.

condemnation of property as prize, it cannot be condemned under the statutes for a forfeiture on the instance side of the court.[1]

§ 81. **Seizures cognizable in the district court of the district into which the property may be taken.**—In case of the seizure for forfeiture of any vessel or cargo entering any port or harbor which has been closed by the President of the United States in pursuance of law, or of goods or chattels coming from a state or section of the country declared by the President to be in insurrection, into other parts of the United States, or of any vessel or vehicles conveying such property, or conveying persons to or from such state or section, or of any vessel belonging in whole or in part to any inhabitant of such state or section, the proceeding may be prosecuted in any district court into which the property so seized may be taken and proceedings instituted; and the district courts have in such cases as full and complete jurisdiction over such proceedings as if the seizure had been made in that district.[2] By the general practice in such cases, where there is a seizure upon the high seas, any district court may take cognizance of proceedings for the forfeiture, in any district into which the property is brought.[3]

§ 82. **Trial by jury, when.**—Section 566 of the Revised Statutes provides that "the trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, . . . shall be by jury." And in certain admiralty cases which relate "to any matter of contract or tort, upon or concerning any vessel of twenty tons burden or upward enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it."

Although the statute provides for a trial of issues of fact in certain cases by a jury, still this right may be waived, and the parties may stipulate for a trial of these issues by the court, even upon an agreed statement of facts.[4]

[1] United States *v.* Weed, 5 Wall. 62; Jecker *v.* Montgomery, 13 How. 498; The Brig Caroline, 7 Cr. 496; The Samuel, 1 Wh. 9; The Mary Anne, 8 Wh. 380; The Venice, 2 Wall. 258; Cappell *v.* Hall, 2 Wall. 542; Mrs. Alexander's Cotton, 2 Wall. 404.

[2] Rev. Stat. § 564.

[3] The Abby, 1 Mason 360. See also The Maggie Hammond, 9 Wall. 435; The Merino, 9 Wh. 391.

[4] Henderson's Distilled Spirits, 14 Wall. 40.

§ 83. **Libels in instance causes.**—What is required to be stated in libels in instance causes is provided by rule as follows: "All libels in instance causes, civil or maritime, shall state the nature of the cause; as, for example, that it is a cause civil and maritime of contract, or of tort or damage, or of salvage, or of possession, or otherwise as the case may be; and if the libel be *in rem*, that the property is within the district; and, if *in personam*, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of due process to enforce his rights, *in rem* or *in personam* (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof."[1] It is not necessary to state any facts which constitute a defence of the claimant of the vessel, or a ground of exception to the operation of the law on which the libel is founded;[2] but the libel should show facts conferring jurisdiction on the court; and no evidence is admissible except to sustain its allegations.[3] And it should state in distinct allegations the matters relied upon as grounds of forfeiture.[4]

§ 84. **Amendments.**—Liberal provisions, as we have noticed, are made by rule for amendments of pleadings in causes of admiralty and maritime jurisdiction; and in matters of form, they may be made at any time on motion to the court, as of course. But if it is desired to add new counts to the information or libel, or amend upon matters of substance, this may be done upon motion, at any time before a final decree, only on such terms as the court may impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.[5]

[1] Adm. Rule 23; About 18,000 Gallons of Distilled Spirits, 5 Ben. 4.

[2] The Aurora *v.* The United States, 7 Cr. 382; Thomas *v.* Lane, 2 Sum. 1.

[3] The Boston and Cargo, 1 Sum. 328; The Havre, 1 Ben. 295; Bom *v.* The Hornet, Crabbe 426.

[4] Distilled Spirits, etc., 5 Ben. 4; Treadwell *v.* Joseph, 1 Sum. 390.

[5] Adm. Rule 24; Town *v.* Steamship

Under this rule, where a libellant proceeded originally against a vessel, master, owners and pilot, he could by leave of court amend his libel so as to apply to the vessel and master only.[1]

§ 85. **Defendant to give security.**—Upon the appearance of the defendant in a suit *in personam*, where no bail has been taken of him, and no attachment of property has been made to answer the exigency of the suit, the court, in its discretion, may require the defendant to give a stipulation with sureties, to pay all costs and expenses which may be awarded against him, upon a final adjudication of the suit, or by any interlocutory order made during the progress of it.[2] But if the defendants are guilty of no irregularity or wrong in tendering their appearance and pleading to the action, the libellants may waive the right to claim security, and this will not impair the validity of any proceedings in the cause thereafter.[3]

For forms, see *post*, Nos. 114, 127–130.

§ 86. **Answer; verification.**—In all causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the defendant, if he desires to make a defence to the suit, should make a proper answer to the libel upon the return day of the process, or such other day as the court may upon a proper application assign. The answer should be full, explicit and distinct to each separate article and each separate allegation of the libel, and in the same order as numbered in the libel, and in like manner to each interrogatory propounded at the close of the libel; and it must be on oath or solemn affirmation,[4] except in cases where the matter in dispute does not exceed the sum or value of fifty dollars, exclusive of costs, unless the court shall be of the opinion that for the purposes of justice[5] the general rule should be observed. This rule is appliable to cases on the instance side of the court.[6] If a plea to the jurisdiction is interposed, it must be by the defendant himself in *propria persona*, and on oath, and no third person is permitted to file such a plea.[7]

For forms of claim and answer, see *post*, No. 122.

Western Metropolis, 28 How. Pr. R. 283.

[1] Newell *v.* Norton, 3 Wall. 257.

[2] Adm. Rule 25.

[3] Pharo *v.* Smith, 18 How. Pr. R. 47.

[4] Adm. Rule 27; Coffin *v.* Jenkins, 3 Story 108.

[5] Adm. Rule 48.

[6] Gammell *v.* Skinner, 2 Gall. 45; Dunlap's Adm. Pr. 209.

[7] The Rambler, Bee's Adm. 9. The district courts may, perhaps, provide by rule for the verification of pleadings by other parties: Adm. Rule 46.

§ 87. **Exceptions to libel and answer.**—Although there would appear to be no reason why a demurrer to a libel might not be appropriate where it is insufficient in substance, the common mode of testing its sufficiency, as well as that of an answer, is by exceptions taken thereto. The exceptions in such a case take the place of a demurrer in common law and equity proceedings. The want of sufficiency, fullness, distinctness or relevancy of an answer to the articles and interrogatories in the libel may be excepted to, and if the court shall consider the exceptions well taken it may order the defendant forthwith, or within such time as it may direct, to answer over and pay such costs as may be deemed reasonable.[1]

One of the rules prescribed by the Supreme Court provides: "The libellant may except to the sufficiency or fullness or distinctness or relevancy of the answer to the articles and interrogatories in the libel; and if the court shall adjudge the same exceptions, or any of them, to be good and valid, the court shall order the defendant forthwith, or within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable."[2] Under this rule an exception for impertinence in an allegation of an answer was allowed, where it served no legal purpose and was a mere slur on the libellant.[3]

Exceptions may also be taken to any libel, allegation or answer for surplusage, irrelevancy, impertinence or scandal, which may be referred to a master, and if he shall report the matter so excepted to as objectionable, and this is sustained and allowed by the court, the matter will be expunged at the cost and expense of the party in whose pleading the objectionable matter is found.[4]

For forms in equity, see *post*, No. 49.

§ 88. **Default on failure to answer.**—If the defendant omits or refuses to answer the libel at the time above indicated, the court will adjudge him to be in contumacy and default, and that the libel be taken *pro confesso* against him, and the court will proceed to hear the cause *ex parte* and to make such a decree as law and justice may require. But the court may at any time before a final decree, upon the application of the defendant, set aside the default and

[1] 2 Conk. Adm. 238; Adm. Rules 24, 28, 36; Town *v.* Steamship Western Metropolis, 28 How. Pr. 283.

[2] Adm. Rule 28.

[3] The Pioneer, Deady 58.

[4] Adm. Rule 36; United States *v.* Barrels of Alcohol, 10 Int. Rev. Rec. 17.

permit him to answer the libel, upon his paying all the costs of the suit up to the time of granting leave therefor. If the defendant refuses to answer any particular interrogatory, the charge in the libel to which it refers will be taken *pro confesso*.[1] But statements in a libel which contain no claim for damages, and for which no remedy is prayed, need not be answered specifically.[2]

§ 89. **When a further answer will be required; what defendant may object to answer.**—If the defendant answers, but does not answer fully, explicitly and distinctly to all matters in any article of the libel, the libellant may file exception thereto, and if it is allowed the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken *pro confesso* against the defendant to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.[3] And in all cases where a default is entered, and where an order is entered that the pleadings be taken *pro confesso*, if the court has jurisdiction of the subject-matter and of the parties, and a final decree is entered, the presumption is that all the facts necessary to warrant the decree or judgment were found, if they are sufficiently averred in the pleadings.[4]

But "the defendant may object, by his answer, to answer any allegation of the libel which will expose him to any prosecution or punishment for a crime, or for any penalty, or any forfeiture of his property for any penal offence."[5]

In a proceeding in admiralty by information for a forfeiture, it was held that the claimants should not be required to produce an invoice called for by the United States as libellant, as it might expose them to prosecution and punishment.[6]

§ 90. **The defendant may require the libellant to answer interrogatories.**—The defendant may also, at the close of his answer, propound to the libellant any interrogatories touching any matters charged in the libel, or any matter of defence set up in his answer, and require the libellant to answer the same upon oath or solemn affirmation, subject to the like exception as to matters which shall

[1] Adm. Rule 29; The David Pratt, Ware 509; Miller *v.* The United States, 11 Wall. 268.

[2] The Brig Aldebaran, Ole. Adm. R. 130.

[3] Adm. Rule 30.

[4] Miller *v.* The United States, 11 Wall. 268.

[5] Adm. Rule 31.

[6] The United States *v.* Twenty-eight Packages of Pins, Gilpin 306.

expose the libellant to any prosecution, or punishment or forfeiture, as is set forth in the foregoing section. And if the libellant fails to make proper answers to such interrogatories, the court may adjudge him to be in default and dismiss the libel, or may compel proper answers by attachment, or take the subject-matter of the interrogatories *pro confesso* in favor of the defendant, in the same manner and to the same extent as where the defendant refuses to answer interrogatories of the libellant, as the court in its discretion shall deem most fit to promote justice.[1]

§ 91. **When the verification of an answer to interrogatories may be dispensed with.**—We have noticed that the general rule is that the answer must be verified, but this may be dispensed with in certain cases. Thus "where either the libellant or the defendant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable."[2]

§ 92. **New facts in the answer; practice in case of.**—If a defendant in his answer alleges new facts, these are to be treated as denied by the libellant, and no replication, general or special, is allowed. But the libellant may, within such time after the answer is filed as may be fixed by the court, either by a general rule or by a special order, amend his libel, so as to confess and avoid, or explain, or add to the new matters set forth in the answer, and the defendant may in like manner, within such time as may be fixed by the court, amend his answer.[3]

§ 93. **Cross-bill, when filed; security for costs.**—Whenever the defendant has a counter-claim arising out of the same cause of action for which the original libel was filed, he may file a cross-bill therefor; and in such a case the respondents thereto are required to give security in the usual form to respond in damages as claimed in said cross libel, unless the court on cause shown shall otherwise direct; and proceedings upon the original libel will be stayed until such security be given.[4]

[1] Adm. Rule 32; The David Pratt, 1 Ware 509; Gammell *v.* Skinner, 2 Gallis. 45.

[2] Adm. Rule 33.

[3] Adm. Rule 51.

[4] Adm. Rule 53.

§ 94. **Attachment proceedings; garnishee.**—The libellant is entitled to a process of foreign attachment whenever the defendant has concealed himself or absconded from the country, and the goods to be attached are within the admiralty jurisdiction of the court; and it may issue against his goods and chattels, and against his credits and effects in the hands of third persons.[1] And in such cases, if a creditor is garnisheed, he is required to answer on oath or solemn affirmation as to the debts and credits and effects of the defendant in his hands, and to all such interrogatories touching the same as may be propounded to him by the libellant; and if he refuses or neglects so to do, the court may award compulsory process against him. If he admits any debts, credits or effects in his hands, the same shall be held by him liable to answer the result of the suit.[2] It is the duty of the garnishee to put in an answer as required by the garnishment notice. But if he makes default, and judgment is entered against the defendant, execution will issue in the first instance only against the debts, effects and credits of the principal in his hands. If the libellant can satisfy the court, by affidavits or otherwise, that the garnishee has sufficient debts, effects or credits of the principal defendant in his hands to satisfy the judgment, he is entitled to an execution against him; or if necessary to have an answer, he may have compulsory process *in personam* to compel the same.[3]

§ 95. **Attached property in the hands of a third party, when brought into court.**—It is provided by rule that "in cases of mariners' wages, or bottomry, or salvage, or other proceedings *in rem*, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit; and upon failure of the party to comply with the order, may award an attachment or other compulsive process, to compel obedience thereto."[4] In some

[1] Mauro *v.* Almeida, 10 Wh. 473.
[2] Adm. Rule 37.
[3] Story *v.* Rennell, 1 Sprague 418; Adm. Rule 37.
[4] Adm. Rule 38.

cases where the court has parted with the possession of the property, on the giving of a stipulation, and justice requires the court to retake the same, and it is in the actual or constructive possession of a person not a party to the stipulation, it can only be done by a monition and not by an execution in the first instance.[1] This is the rule of practice in prize, bottomry and salvage cases as well as in libels for wages.[2]

§ 96. **Where the libellant does not appear; dismissal.**—We have noticed the practice and the rights of the libellant in case the defendant fails to appear, and it is here appropriate to notice the practice and the rights of the defendant in case the libellant fails to appear. Where the latter does not appear and prosecute his suit according to the course and orders of the court, he will be considered in default and contumacy, and the court will upon the application of the defendant pronounce the suit deserted, and dismiss the same with costs.[3]

§ 97. **A decree on default may be rescinded.**—Where the matter of a libel shall have been decreed against a defendant, on account of his contumacy and default, the court may, on motion by him and the payment of costs, at any time within ten days after the decree has been entered, rescind the decree and grant a rehearing of the cause. The court may, however, make the rehearing conditional upon the defendant's submitting to such further orders and terms in the premises as it may direct.[4] But a rehearing cannot be had after the term of the court has passed at which the decree was rendered.[5] In this case it is expressly provided that the rehearing may be had only on motion. This should be in writing. And in all cases where a party is entitled to any order or judgment of the court, for a neglect of duty, or a disregard of the rules of pleading or the orders of the court by the adverse party, as where the libellant is entitled to a default on the neglect of the defendant to answer in due time, the proper practice is to file a motion in writing setting forth the facts, and asking the court to take such action as the party may be entitled to.

For form of decree *pro confesso*, see *post*, No. 154.

[1] The Gran Para, 10 Wh. 497.
[2] Shepard *v.* Taylor, 5 Pet. 675; Adm. Rule 38.
[3] Adm. Rule 39.
[4] The New England, 3 Sum. 495; Adm. Rule 40.
[5] The Steamboat New England, 3 Sum. 495.

§ 98. **Proceeds of property; deposit of money.**—All sales of property under any decree in admiralty must be made by the marshal or his deputy, or other proper officer designated by the court where the marshal is a party in interest, in pursuance of the orders of the court, and it is the duty of the officer making the sale to forthwith pay the same into the registry of the court, to be disposed of according to law; and such moneys must be deposited in some bank designated by the court, and in the name of the court, and can only be drawn out on checks signed by the judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit, and out of what fund in particular it is paid. And it is the duty of the clerk to keep a regular book containing a memorandum and copy of all checks so drawn and the date thereof.[1]

The same rule prevails in case of interlocutory sales as those made under a final decree;[2] also, where the sale is made by the order of the court on a partial credit. If, in the latter case, payments are to be made in installments, and notes, bonds or other securities are taken therefor, the creditor has a right to insist that they be brought into court, but for convenience they are sometimes permitted to remain in the hands of the officer.[3]

§ 99. **Party interested may intervene for proceeds.**—If a party has an interest in any proceeds in the registry, he may intervene by petition and summary proceedings *pro interesse suo* for a delivery thereof to him; and upon due notice thereof to the adverse party, if any, the court will proceed summarily to hear and decide upon the same and decree therein according to law and justice. But if such petition or claim shall be deserted, or if, upon a hearing, it shall be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.[4]

Where a person held a mortgage upon the moiety of a vessel which was afterwards libelled, condemned and sold by process in admiralty, and the proceeds brought into the registry of the court, it was held that he could not file a libel against a moiety of those proceeds, but that his proper course was to appeal as a claimant by a petition for a distributive share of the proceeds.[5]

[1] Adm. Rules 41 and 42.

[2] The Avery and Cargo, 2 Gall. 308.

[3] Walls *v.* Thornton, 2 Brock. 422.

[4] Adm. Rule 43.

[5] Schuchardt *v.* The Angelique, 19 How. 239. But see, in case of mortgage for advances made, Leland *v.* The Medora, 2 Woodb. & M. 92.

A party having an interest in the proceeds may intervene, though this involves the settlement of partnership accounts.[1] And the surplus remaining in the registry after the satisfaction of a prior lien creditor may be appropriated to the payment of other liens, on the proper intervention of the holders, but not for the satisfaction of debts arising on contracts of a merely personal character.[2]

The owner and mortgagee may both appear, and by answer or petition claim the proceeds of the ship, after the satisfaction of the claims of a libellant who sues on a bottomry bond.[3]

§ 100. **Matters may be referred to commissioners.**—The court has authority to refer any matters arising during the progress of a suit to one or more commissioners, where it shall deem it expedient or necessary for the purposes of justice; and such commissioners possess all the powers which are usually given to or exercised by masters in chancery in reference to them, and may administer oaths and examine the parties and witnesses touching the premises.[4] And it may thus refer the question of the validity of a bottomry lien and direct the commissioner to ascertain and report the actual constituents of the lien.[5] So, where it appears to the court that the main questions in controversy are in reference to accounts between the parties as master and owner of a vessel, it has been held proper to refer the case to a commissioner.[6]

§ 101. **Bail on arrest; imprisonment for debt.**—Where a simple warrant of arrest is issued and executed in suits *in personam*, bail is required to be taken by the marshal and the court only in those cases in which it is required by the laws of the state where the arrest is made, upon similar or analogous process issuing from the state courts. And imprisonment for debt is abolished on process issuing out of the admiralty court, in all cases where, by the laws of the state in which the court is held, imprisonment for debt is abolished, upon similar or analogous proceedings issued from a state court.[7]

§ 102. **Extension of admiralty jurisdiction.**—We have considered those matters essential to confer admiralty jurisdiction on the dis-

[1] The Goldsmith, 1 Newb. 123.

[2] Brackett *v.* The Hercules, Gilp. 184; Harper *v.* The New Brig, Id. 536. See also The Lottawanna, 21 Wall. 558.

[3] The Panama, Olc. 343.

[4] Adm. Rule 44.

[5] Shaw *v.* Collier, 18 How. Pr. R. 238.

[6] Shaw *v.* Collier, 28 How. Pr. 238.

[7] Adm. Rule 47. In the case of bail the court will not permit a party to be held to bail in two places at the same time for the same cause of action: Bingham *v.* Wilkins, Crabbe 50.

trict courts, from which it will appear that they have jurisdiction of all proceedings in admiralty on maritime contracts and for maritime torts, and that their jurisdiction depending upon locality is not limited, by the rules of admiralty in England, to the high seas and to waters where the tide ebbs and flows, but extends, at least in certain cases, over the inland lakes and navigable rivers. The general practice and mode of procedure in these courts, as courts of admiralty and maritime jurisdiction, is substantially the same as that which obtained in England at the time of the organization of our government.

The term *high seas*, in English admiralty law, embraced not only the seas proper, but all arms, estuaries, harbors, havens and rivers wherever the tides ebbed and flowed, but not any part of said waters that lay within the body of a county. The ebb and flow of the tides in England was the test of the navigability of inland waters, and on this account it was made the limit of admiralty jurisdiction over such waters; and the common law courts, ever jealous of the encroachments of the admiralty, which was a branch of the civil law, succeeded in excluding its jurisdiction from any part of the waters of the sea, even where the tide ebbed and flowed, if it lay within the body of any county, on the ground that in such cases the common law courts and remedies would be ample for the administration of justice, either in suits on contracts or for torts of a maritime character, and that, by the spirit of the English constitution, they came within the powers and jurisdiction of those courts, which secured a trial of issues of fact by a jury, whereas the admiralty practice excluded a trial by jury, the court deciding both questions of law and of fact, which was distasteful to the common law courts and, generally, to the people.

This limitation does not, as we have observed, apply to the jurisdiction of the district courts of this country sitting in admiralty. It has been expressly held that they could take cognizance of a proceeding in admiralty for a tort committed on a river navigable from the sea, although it occurred above tide water and within the boundary of a county.[1]

[1] United States *v.* The Betsey, 1 Id. 443; Jackson *v.* Steamboat Magnolia, 20 How. 296; Walsh *v.* Rogers, 13 Id. 283; Ure *v.* Coffman, 19 Id. 56; Nelson *v.* Leland, 22 Id. 48; Sturgis *v.* Boyer, 24 Id. 110; Propeller Commerce, 1 Black 580; Norwich *v.* Wright, 13 Wall. 104.

The general principles of admiralty law we inherited from the mother country, so far as they were adapted to our circumstances and wants; but the rule limiting the jurisdiction of courts of admiralty to the high seas and to tide waters was not particularly applicable to this country, where we have a chain of large inland lakes and large rivers navigable from the sea for thousands of miles, and whose navigation, in many cases far above tide water, contributes largely to increase the commerce and general business prosperity of the country. Under such circumstances there is no reason for the limitation of admiralty jurisdiction of our national courts to tide waters, and where the reason for the rule ceases the rule itself should cease.

We have noticed that Congress has at different times passed acts to confer jurisdiction in admiralty upon these courts, in such cases, under certain limitations; but it may be questionable whether any such legislation was required in the light of the broad and comprehensive views on this subject recently expressed by the justices of our Supreme Court.[1]

§ 103. **Embezzlement by the master of a vessel; liability of the owner limited.**—It is provided by section 4283 of the Revised Statutes that "the liability of the owner of any vessel for any embezzlement, loss or destruction by any person of any property, goods or merchandise shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount of the interest of such owner in such vessel and her freight then pending."[2]

In such a case, if there are several freighters or owners of goods, wares and merchandise on the same voyage, and the whole value of the vessel and her freight on the voyage is not sufficient to make compensation to each of them, they can only receive compensation in proportion to their respective losses; and if said owner or owners desire to claim the benefit of such limitation of liability, they may file a libel or petition in any district court of the United States

[1] The Hine, 4 Wall. 555; The Genesee Chief, 12 How. 443; The Moses Taylor, 4 Wall. 411; The Eagle, 8 Id. 15; The Steamboat Co. *v.* Chase, 16 Id. 522.

[2] Norwich Company *v.* Wright, 13 Wall. 104; Allen *v.* McKay, 1 Sprague 219.

where the ship or vessel may be libelled to answer for such embezzlement, loss, destruction, damage or injury; or if the ship or vessel be not libelled, then in the district court of any district in which the said owner or owners may be sued in that behalf,[1] in which libel or petition they should set forth the facts and circumstances on which such limitation of liability is claimed, and pray proper relief in that behalf; and it is the duty of the court thereupon to cause due appraisement to be made of such ship or vessel and her freight for the voyage, and to make an order for the sale of the same and payment of the proceeds into court, or for the giving of a stipulation, with sureties, for the payment of the amount of the appraised value into court whenever the same shall be so ordered; unless the said owner or owners shall elect to transfer his or their interest in such ship or vessel and freight to a trustee, to be appointed by the court, as provided by section 4285 of the Revised Statutes, in which case the court is required to make an order to that effect; and upon compliance with such order, the court is required to issue a monition against all persons claiming damages for the aforesaid causes, or either of them, citing them to appear before the court and make due proof of their respective claims on or before a certain time to be named in said writ, not less than three months from the issuing of the same. Public notice of such monition is required to be given as in other cases, and such further notice served through the post-office, or otherwise, as the court in its discretion may direct; and the court is further required, on the application of such owner or owners, to make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect to any such claim or claims.[2]

§ 104. **Proof made before a commissioner.**—The proof of all claims made in pursuance of the monition aforesaid must be made before a commissioner to be designated by the court, subject to the right of any person interested to question or controvert the same. It is the duty of such commissioner, on the completion of said proofs, to make a report of the claims so proven, and after hearing any exceptions thereto, and a confirmation of such report, the moneys paid or secured to be paid into court as aforesaid, or the proceeds thereof, and of the freight (after the payment of the costs

[1] Adm. Rule 57; Rev. Stat. § 4284. Ben. 55; The City of Norwich, 1
[2] Adm. Rule 54; The Bristol, 4 Ben. 89.

and expenses), must be divided *pro rata* amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.[1]

§ 105. **Who may defend in such cases.**—"In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel, for said embezzlement, loss, destruction, damage or injury (independently of the limitation of liability claimed under said act); *provided*, that in his or their libel or petition he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to limitation of liability under the said act of Congress [statute], or both."[2]

But the provisions of the statute above referred to do not affect any remedy which a party may be entitled to against the masters, officers or seamen, for or on account of the damages aforesaid.[3]

§ 106. **Further proof taken on appeal in the circuit court.**—In case of an admiralty appeal, further proof may be taken in the circuit court, by deposition, before some commissioner appointed by that court,[4] pursuant to sections 863, 864 and 865 of the Revised Statutes, or before the officers therein mentioned. The deposition in such cases must be upon oral examination and cross-examination, unless the court in which such appeal is pending, or one of the judges thereof, shall, upon motion, allow a commissioner to take the same upon written interrogatories and cross-interrogatories. If taken by oral examination, the adverse party must be notified by the magistrate before whom it is to be taken, or by the clerk of the court in which the appeal is pending, of the time and place of the taking of the same, and before whom, and that he can appear and put interrogatories if he thinks fit; and this notice must be served on the adverse party or his attorney, allowing time for their attendance after being notified, not less than twenty-four hours, and in addition

[1] Adm. Rule 55; Providence and N. Y. S. S. Co., 15 Int. Rev. Rec. 193.
[2] Adm. Rule 56.
[3] Rev. Stat. § 4287.
[4] Adm. Rule 49.

thereto one day, Sundays exclusive, for every twenty miles travel; but the court where the appeal is pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above set forth.[1] If the evidence is so contradictory in a revenue or instance cause as to make a decision difficult, the court may order further proof.[2]

§ 107. **When district and circuit courts may regulate practice.**—It is provided by a rule in admiralty that, in all cases not provided for by the rules prescribed by the Supreme Court of the United States regulating the practice in admiralty, the district and circuit courts may regulate the same in said courts respectively, in such manner as they shall deem most expedient for the proper administration of justice.[3]

§ 108. **Suits on debentures.**—Whenever an importer of merchandise enters it for exportation and pays the duties thereon, he is usually entitled to a certain amount of the sum thus paid on the exportation thereof, called a drawback.[4] And if the importer makes a request therefor in writing, it is the duty of the collector of the port of entry to issue a certificate of drawback in writing showing that the importer is entitled to a certain sum from the government on the exportation of the identical goods on which the import duties have been paid, which certificates are called debentures. These debentures are assignable by delivery and indorsement, and in case of the refusal of the collector of the district where it was granted, for a longer period than three years after the same becomes due and payable, to pay the same, as provided by the ninth chapter of the Revised Statutes, the assignee may bring suit thereon against the person to whom it was originally granted, or against any indorser thereof, either in the district or circuit courts of the United States.[5]

§ 109. **Suits for damages against conspirators; equal rights of all persons.**—Chapter xxiv. of the Revised Statutes provides for the recovery of damages sustained by any person on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in said chapter; and the

[1] See also Adm. Rule 49.

[2] The Samuel, 1 Wh. 9. See also The Georgia, 7 Wall. 32; The Ocean Queen, 6 Blatch. 24.

[3] Adm. Rule 46; Beers *v.* Haughton, 9 Pet. 329.

[4] See Rev. Stat. ch. ix.

[5] Rev. Stat. §§ 563, sub. 10, 629, sub. 8, 3039, 3040.

district courts have jurisdiction of all such suits.[1] So these courts have jurisdiction of suits at law or in equity to redress the deprivation, under the color of law, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity secured by the Constitution of the United States, or by any law of the United States, to persons within the jurisdiction thereof.[2]

§ 110. **Suits to recover offices, remove officers and against national banks.**—The district court has also jurisdiction of suits to recover the possession of any office except that of elector of President or Vice-President, or delegate in Congress, or member of a state legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of a denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude. But such jurisdiction only extends so far as to determine the rights of the parties to such office by reason of the denial of the right, guaranteed by the Constitution and secured by any law, to enforce the right of citizens of the United States to vote in all the states.[3] So it has jurisdiction of proceedings by *quo warranto* prosecuted by any district attorney for the removal from office of any person holding the same, except as a member of Congress or of a state legislature, contrary to the provisions of the third section of the fourteenth article of the amendment to the Constitution of the United States.[4] So it has jurisdiction of all suits by or against any association established under any law providing for national banking associations within the district for which the court is held,[5] and of all suits brought by any alien for a tort only, in violation of the law of nations, or of a treaty of the United States.[6]

§ 111. **Suits against consuls and vice-consuls.**—The district court has also jurisdiction of suits against consuls and vice-consuls, except for offences above that of a tort in violation of the law of nations, or of a treaty of the United States.[7] International law does not exempt consuls from the jurisdiction of the circuit courts, and they may sue and be sued in them within the district of their residence, if the value of the amount in dispute exceeds five hundred dollars.[8]

[1] Rev. Stat. § 563, sub. 11.
[2] Id. sub. 12; Rev. Stat. §§ 1977, 1979.
[3] Rev. Stat. § 563, sub. 13; see also § 2610.
[4] Rev. Stat. § 563, sub. 14.
[5] Rev. Stat. § 563, sub. 15.
[6] Rev. Stat. § 563, sub. 16.
[7] Rev. Stat. § 563, sub. 17.
[8] Lorway *v.* Lousada, 1 Am. Law

The jurisdiction of the district court in such cases is exclusive of state courts; and it has been held that if a consul is sued in a state court and he neglects to plead his exemption from its jurisdiction, it is not a waiver of his privilege, as it is the privilege of the country which he represents and not merely a personal privilege, and the fact may be shown at any time.[1]

§ 112. **In bankruptcy.**—The district courts are courts of bankruptcy, and have in their respective districts original jurisdiction in all matters and proceedings in bankruptcy.[2] As we have at present no national bankrupt law (the Bankrupt Act of 1867 having been repealed in 1879), it is hardly necessary to give this subject that consideration which its importance would demand if there was a bankrupt law in force.

§ 113. **Appeals to the circuit court.**—Provision is made for appeals from the decisions of a district court to the circuit court next to be held in the district, from all final decrees in causes of equity or of admiralty and maritime jurisdiction, except prize causes, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, and such circuit court is required to receive, hear and determine such appeal.[3] Copies of the proof in such a case, and of such entries and papers on file as may be necessary on the hearing of the appeal, must be certified up to the appellate court.[4] Besides this, the final judgments of the district court in civil actions, where the matter in dispute exceeds fifty dollars exclusive of costs, may be re-examined and reversed or affirmed in a circuit court holden in the same district, upon a writ of error.[5]

§ 114. **Time of taking appeals to the circuit courts.**—It is provided by statute that no judgment, decree or order of the district court can be reviewed by a circuit court on writ of error or appeal, unless the writ of error is sued out or the appeal taken within one year after the entry of such judgment, decree or order, except where the party entitled thereto is an infant, or *non compos mentis*, or imprisoned, in which cases the appeal may be taken within the time aforesaid, exclusive of the term of such disability.[6] An ap-

Rev. 92; 1 Low. (C. C.) 77: Gettings *v.* Crawford, Taney (C. C.) 1; Rev. Stat. § 629, par. 1; act March 3, 1875, § 1.

[1] 26 Pet. 41; Davis *v.* Packard, 7 Pet. 276. See also St. Luke's Hospital *v.* Barkley, 3 Blatch. (C. C.) 259.

[2] Rev. Stat. § 563, sub. 18.

[3] Rev. Stat. § 631.

[4] Rev. Stat. § 632.

[5] Rev. Stat. § 633.

[6] Rev. Stat. § 635. This provision would appear to supersede Admiralty Rule 45, which was amended May 6,

peal to the circuit court carries up the whole fund, and mere technical errors in the decree not prejudicial to the substantial rights of the parties will be disregarded.[1]

§ 115. **What must be certified by the clerk on appeals to the circuit courts.**—It is provided by a rule of practice in admiralty as follows:

The clerks of the district courts shall make up the records to be transmitted to the circuit courts on appeals, so that the same shall contain the following:

1. The style of the court.

2. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.

3. If bail was taken, or property was attached or arrested, the process of the arrest or attachment and service thereof, all bail and stipulations, and if any sale has been made, the orders, warrants and reports relating thereto.

4. The libel, with the exhibits annexed thereto.

5. The pleadings of the defendants, with the exhibits annexed thereto.

6. The testimony on the part of the libellant, and any exhibits not annexed to the libel.

7. The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.

8. Any order of the court to which exception was made.

9. Any report of an assessor or assessors, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the assessor, are to be stated.

10. The final decree.

11. The prayer for an appeal, and the action of the district court thereon; and no reasons for appeals shall be filed or inserted in the transcript.

The following shall be omitted:

1872, and required appeals in admiralty causes to be taken while the court was sitting, or within such period as might be designated by a general rule, or by a special order of the court, or in case there was no such rule or order, then within thirty days from the rendering of the decree. For a construction of this rule, see The Neustra Senora de Regla, 17 Wall. 29; Norton *v.* Rich, 3 Mas. 443.

[1] The Wanata, 95 U. S. 600.

1. The continuances.

2. All motions, rules and orders not excepted to which are merely preparatory for trial.

3. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the district court was founded on some one or more of these; in which case so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be enough to give the name of the witnesses, and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.[1]

The clerk is also required to page the copy of the record, and make an index of the same, and certify at the end thereof, under the seal of the court, that it is a transcript of the record of the district court in the cause named at the beginning of the copy made up as above directed.[2]

§ 116. **Appeals to the Supreme Court.**—Appeals from the district courts to the Supreme Court in prize causes are required to be taken within thirty days after the rendering of the decree, unless the court previously extends the time for cause shown in the particular case;[3] and they are governed by the same rules, regulations and restrictions as are prescribed by law in cases of writs of error. Where an appeal is taken by both parties, a transcript of the record filed by either in the Supreme Court may be used on both appeals, and both appeals may be heard thereon in the same manner as if the records had been filed by the two appellants in both cases.[4]

[1] Adm. Rule 52.

[2] Adm. Rule 52. See also The Grace Girdler, 6 Wall. 441; The Vaughan, 14 Wall. 258.

[3] Rev. Stat. § 1009. See also The Neustra, 17 Wall. 29.

[4] Rev. Stat. §§ 1012, 1013.

CHAPTER VII.

JUDICIAL CIRCUITS AND ORGANIZATION OF THE CIRCUIT COURTS.

§ 117. **Judicial circuits.**—*Sec.* 604. The judicial districts of the United States are divided into nine circuits, as follows:

First. The first circuit includes the districts of Rhode Island, Massachusetts, New Hampshire and Maine.

Second. The second circuit includes the districts of Vermont, Connecticut and New York.

Third. The third circuit includes the districts of Pennsylvania, New Jersey and Delaware.

Fourth. The fourth circuit includes the districts of Maryland, Virginia, West Virginia, North Carolina and South Carolina.

Fifth. The fifth circuit includes the districts of Georgia, Florida, Alabama, Mississippi, Louisiana and Texas.[1]

Sixth. The sixth circuit includes the districts of Ohio, Michigan, Kentucky and Tennessee.

Seventh. The seventh circuit includes the districts of Indiana, Illinois and Wisconsin.

Eighth. The eighth circuit includes the districts of [2]Colorado, Nebraska, Minnesota, Iowa, Missouri, Kansas and Arkansas.

Ninth. The ninth circuit includes the districts of California, Oregon and Nevada.

JUSTICES ALLOTTED TO CIRCUITS, HOW DESIGNATED.—*Sec.* 605. The words "circuit justice" and "justice of a circuit," when used in this title, shall be understood to designate the justice of the Supreme Court who is allotted to any circuit; but the word "judge," when applied generally to any circuit, shall be understood to include such justice.

ALLOTMENT OF THE JUSTICES TO THE CIRCUITS.—*Sec.* 606. The Chief Justice and associate justices of the Supreme Court shall be allotted among the circuits by an order of the court, and a new allotment shall be made whenever it becomes necessary or convenient by reason of the alteration of any circuit, or of the new appointment

[1] As amended by act of June 11, 1879, ch. 18, § 4, 21 Stat. 10.

[2] As amended by act of June 26, 1876, ch. 147, § 1, 19 Stat. 61.

of a Chief Justice or associate justice, or otherwise. If a new allotment becomes necessary at any other time than during a term, it shall be made by the Chief Justice, and shall be binding until the next term and until a new allotment by the court.

CIRCUIT JUDGES.—*Sec.* 607. For each circuit there shall be appointed a circuit judge, who shall have the same power and jurisdiction therein as the justice of the Supreme Court allotted to the circuit, and shall be entitled to receive a salary at the rate of six thousand dollars a year, payable quarterly on the first days of January, April, July and October. Every circuit judge shall reside within his circuit.

CIRCUIT COURTS, WHERE ESTABLISHED.—*Sec.* 608. Circuit courts are established as follows: One for the three districts of Alabama, one for the eastern district of Arkansas, one for the southern district of Mississippi, and one for each district in the states not herein named; and shall be called the circuit courts for the districts for which they are established.

An act of June 22, 1874, ch. 401, § 1, 18 Stat. 195, provides: That there shall be, and is hereby, established a circuit court of the United States for the middle district of Alabama, as said district is now constituted by law, to be held in the city of Montgomery, and a like court for the northern district of Alabama, as said district is now constituted by law, to be held in the city of Huntsville.

An act of June 22, 1874, ch. 401, § 2, 18 Stat. 195, provides: That said circuit courts shall have and exercise, within their respective districts, the same original powers and jurisdiction as are or may be conferred by law upon the circuit court of the United States for the southern district of Alabama at Mobile, and shall have and exercise appellate and revisory jurisdiction over the decrees and judgments of the district courts of the United States for the said middle and northern districts, respectively, under the laws of the United States regulating the jurisdiction, powers and practice of the circuit courts, and the judges thereof, in cases removed into said courts by appeal or writ of error; and said courts, and the judges thereof, shall have the general superintendence and jurisdiction over all cases and questions arising in said district courts, respectively, under the act approved March 2, 1867, entitled "An act to establish a uniform system of bankruptcy throughout the United States," as provided for in the second section of said act.

An act of June 22, 1874, ch. 401, § 5, 18 Stat. 195, provides: That the circuit court of the United States held at Mobile, Alabama, shall be designated and known as the circuit court of the United States for the southern district of Alabama; and its appellate revisory power, upon appeal or writ of error, or by bill or petition, or otherwise, under the second section of said act, entitled "An act to establish a uniform system of bankruptcy throughout the United States," is hereby restricted to judgments and decrees rendered or causes and questions arising in the district court of the United States for said southern district; and that the fourth section of the act approved March 3, 1873, entitled "An act relating to the circuit and district courts of the United States for the middle and northern districts of Alabama," be and the same is hereby repealed.

CIRCUIT COURTS, BY WHOM TO BE HELD.—*Sec.* 609. Circuit courts shall be held by the circuit justice, or by the circuit judge of the circuit, or by the district judge of the district sitting alone, or by any two of the said judges sitting together.

JUSTICES OF THE SUPREME COURT TO ATTEND ONCE IN TWO YEARS.—*Sec.* 610. It shall be the duty of the Chief Justice, and of each justice of the Supreme Court, to attend at least one term of the circuit court in each district of the circuit to which he is allotted during every period of two years.

JUDGES MAY SIT APART AND TRY CASES.—*Sec.* 611. Cases may be heard and tried by each of the judges holding a circuit court sitting apart by direction of the presiding justice or judge, who shall designate the business to be done by each.

COURTS HELD AT THE SAME TIME IN DIFFERENT DISTRICTS.—*Sec.* 612. Circuit courts may be held at the same time in the different districts of the same circuit.

CRIMINAL TERMS IN THE SOUTHERN DISTRICT OF NEW YORK.—*Sec.* 611. The terms of the circuit court for the southern district of New York, appointed exclusively for the trial and disposal of criminal business, may be held by the circuit judge of the second judicial circuit and the district judges for the southern and eastern districts of New York, or any one of said three judges; and at every such term held by said judge of said eastern district he shall receive the sum of three hundred dollars, the same to be paid in the manner now prescribed by law for the payment of the expenses of another district judge while holding court in said district.

WHEN DISTRICT JUDGES MAY SIT TO REVIEW THEIR OWN OPINIONS.—*Sec.* 614. A district judge sitting in a circuit court shall not give a vote in any case of appeal or error from his own decision, but may assign the reasons for such decision; *provided*, that such a cause may, by consent of parties, be heard and disposed of by him when holding a circuit court sitting alone. When he holds a circuit court with either of the other judges, the judgment or decree in such cases shall be rendered in conformity with the opinion of the presiding justice or judge.

WHEN SUITS ARE TRANSFERRED FROM ONE CIRCUIT TO ANOTHER.—*Sec.* 615. When it appears in any civil suit in any circuit court that all of the judges thereof who are competent by law to try said case are in any way interested therein, or have been of counsel for either party, or are so related or connected with either party as to render it, in the opinion of the court, improper for them to sit in such trial, it shall be the duty of the court, on the application of either party, to cause the fact to be entered on the records, and to make an order that an authenticated copy thereof, with all the proceedings in the case, shall be forthwith certified to the most convenient circuit court in the next adjoining state or in the next adjoining circuit; and said court shall, upon the filing of such record and order with its clerk, take cognizance of and proceed to hear and determine the case in the same manner as if it had been rightfully and originally commenced therein; and the proper process for the due execution of the judgment or decree rendered in the cause shall run into and may be executed in the district where such judgment or decree was rendered, and also into the district from which the cause was removed.

CAUSE CERTIFIED BACK.—*Sec.* 616. The circuit justice, or the circuit judge of any circuit, may order any civil cause, which is certified into any court of the circuit under the provisions of the preceding section, to be certified back to the court whence it came; and then the latter shall proceed therein as if the cause had not been certified from it; *provided*, that if, for any reason, it shall be improper for the judges of such court to try the cause so certified back, it shall be tried by some other judge holding such court, pursuant to the provisions of the next section.

JUSTICES MAY HOLD COURTS OF OTHER CIRCUITS ON REQUEST.—*Sec.* 617. Whenever a circuit justice deems it advisable, on account

of his disability or absence, or of his having been of counsel, or being interested in any case pending in the circuit court for any district in his circuit, or of the accumulation of business therein, or for any other cause, that said court shall be held by the justice of any other circuit, he may, in writing, request the justice of any other circuit to hold the same, during a time to be named in the request; and such request shall be entered upon the journal of the circuit court so to be holden. Thereupon it shall be lawful for the justice so requested to hold such court, and to exercise within and for said district, during the time named in said request, all the powers of the justice of such circuit.

WHEN NO JUSTICE IS ALLOTTED TO A CIRCUIT.—*Sec.* 618. Whenever, by reason of death or resignation, no justice is allotted to a circuit, the Chief Justice of the Supreme Court may make a request as provided in the preceding section, which shall have the effect in like manner until a justice is allotted to such circuit.

CLERKS.—*Sec.* 619. As amended by act of June 19, 1878, ch. 329, § 1, 20 Stat. 204, all the circuit courts of the United States shall have the appointment of their own clerks, the circuit and district judges concurring; and in case of a disagreement between the judges, the appointment shall be made by the associate justice of the Supreme Court allotted to such circuit, except in cases otherwise specially provided for by law.

An act of June 22, 1874, ch. 401, § 3, 18 Stat. 195, provides: That there shall be appointed for each of said circuit courts for said middle and northern districts (of Alabama), by the circuit judge of the circuit, a clerk who shall take the oath and give the bond required by law of clerks of circuit courts, and who shall discharge all the duties and be entitled to all the fees and emoluments prescribed by law for clerks of circuit courts; and the United States marshals for said middle and northern districts shall, respectively, act as marshals for said circuit courts, and the United States district attorney for said districts shall discharge the duties of district attorney in said circuit courts for said middle and northern districts.

An act of June 4, 1880, ch. 120, § 4, 21 Stat. 155, provides: That the clerk of the district court (for the district of Iowa) shall be the clerk of the circuit court at all the places where the same is held in said district, except at Des Moines.

CLERKS IN KENTUCKY.—*Sec.* 620. In the district of Kentucky, a clerk of the circuit court shall be appointed at each place of holding the court, in the same manner and subject to the same duties and responsibilities which are or may be provided for clerks in independent districts.

CLERKS IN NORTH CAROLINA.—*Sec.* 621. In the western district of North Carolina the circuit and district judges shall appoint three clerks, each of whom shall be clerks both of the circuit and district courts for said western district of North Carolina. One shall reside and keep his office at Statesville, one shall reside and keep his office at Asheville, and the third shall reside and keep his office at Greensborough.

CLERKS IN WESTERN VIRGINIA.—*Sec.* 622. In the western district of Virginia the circuit and district judges shall appoint four clerks, each of whom shall be clerks both of the circuit and district courts for said district. One of these clerks shall reside and keep his office at Lynchburg, another shall reside and keep his office at Abingdon, another shall reside and keep his office at Danville, and the fourth shall reside and keep his office at Harrisonburg, in said district.

CLERKS IN WISCONSIN.—*Sec.* 623. In the western district of Wisconsin the circuit and district judges shall appoint two clerks, each of whom shall be clerks both of the circuit and district courts for said district. One shall reside and keep his office at Madison, and the other shall reside and keep his office at La Crosse.

DEPUTY CLERKS.—*Sec.* 624. One or more deputies of any clerk of a circuit court may be appointed by such court, on the application of the clerk, and may be removed at the pleasure of judges authorized to make the appointment. In case of the death of the clerks, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk in his name until a clerk is appointed and qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk, and his estate, and the sureties in his official bond shall be liable; and his executor or administrator shall have such remedy for any such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

DEPUTY CLERKS IN INDIANA.—*Sec.* 625. In the district of In-

diana a deputy clerk of the circuit court must be appointed for said court held at New Albany, and a deputy clerk for said court held at Evansville, who shall reside and keep their offices at said places respectively. Each deputy shall keep in his office full records of all actions and proceedings in the circuit court held at the same place, and shall have the same power to issue all process from the said court that is or may be given to the clerks of other circuit courts in like cases.

COMPENSATION OF DEPUTY CLERKS.—*Sec.* 626. The compensation of deputies of clerks of the circuit courts shall be paid by the clerks respectively, and allowed in the same manner that other expenses of the clerks' offices are paid and allowed.

COMMISSIONERS.—*Sec.* 627. Each circuit court may appoint, in different parts of the district for which it is held, so many discreet persons as it may deem necessary, who shall be called "commissioners of the circuit courts," and shall exercise the powers which are or may be expressly conferred by law upon commissioners of circuit courts. (See sections 2025, 2026.[1])

MARSHALS NOT TO BE COMMISSIONERS.—*Sec.* 628. No marshal or deputy marshal of any of the courts of the United States shall hold or exercise the duties of commissioner of any of the said courts.

[1] See treatment of commissioners of the circuit courts, *post*, ch. xix.

CHAPTER VIII.

JURISDICTION OF THE CIRCUIT COURTS.

§ 118. **Jurisdiction original and appellate.**—The circuit courts of the United States have both original and appellate jurisdiction. The act of Congress of March 3, 1875, prescribes the original jurisdiction of circuit courts as follows: "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects; and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suits shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings, except as hereinafter provided; nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless suit might have been prosecuted in such court, to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law."[1]

[1] Act March 3, 1875, 18 Stat. at Large, ch. 137, § 1, 18 Stat. at Large 470.

The act of 1789[1] provided as follows: "The circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state; and shall have exclusive cognizance of all crimes and offences cognizable, under the authority of the laws of the United States, except where it is otherwise provided, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ; nor shall any circuit or district court have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in case of foreign bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district court under the regulations and restrictions hereinafter provided."

As the provisions of this act were in operation nearly a century, there were many decisions of the federal courts construing their meaning, and these decisions will guide us in the interpretation of the present statute substituted therefor.

§ 119. **Suits of a civil nature at common law or in equity.**—The language of the statutes, "all suits of a civil nature at common law or in equity," has been held to embrace all suits at law on contracts and for torts.[2]

The phraseology of the statute relating to the removal of causes from the state to the circuit courts is similar to that under consideration, and hence any decision construing the statute in either case is applicable to the other. This provision has been held to

[1] 1 Stat. at Large 78.

[2] Kohl *v.* United States, 91 U. S. 367; Weston *v.* Charleston, 2 Pet. 449; Fouvergne *v.* New Orleans, 18 How. 470.

cover suits by attachment,[1] and suits in replevin and in ejectment.[2] And it embraces a suit in equity, to reform an insurance policy;[3] to annul a will;[4] and special statutory proceedings to confirm a tax title.[5] Also suits involving a construction of a bankrupt act,[6] and to restrain or stay execution of a judgment of a state court.[7]

In Wheeler *v.* Bates[8] it was held that the circuit court of the United States had jurisdiction of an action of forcible entry and detainer under the statutes of Illinois, as a "suit of a civil nature" within the meaning of the act of Congress providing for the original jurisdiction of the circuit courts in "all suits of a civil nature at common law or in equity."[9] So it has cognizance of an action under a statute of a state authorizing the recovery of money lost at gaming or horse-racing;[10] and of a suit between different states for a partition of lands under the statutes of a state;[11] and of a suit against a sheriff for an escape, as well as for other neglects and misdemeanors.[12]

The term "at common law or in equity," as used in the statute, does not limit the jurisdiction merely to suits which the old common law recognizes as among its fixed and settled proceedings, but it embraces all suits in which legal rights are to be ascertained and determined, as well as rights in equity.[13]

The pleading, practice and mode of procedure in suits at law is governed by the requirements of the statutes of the states, and by the local laws, as expounded by the decisions of the state courts, as we shall hereafter notice more fully; and if the statutes authorize the commencement of a suit to determine a legal right, a circuit court can take jurisdiction of it as a suit at common law, although it may not be strictly a procedure known or authorized by the common law.[14]

[1] Barney *v.* Globe Bank, 5 Blatch. 107.

[2] Beecher *v.* Gillett, 1 Dill. 308; Dennistoun *v.* Draper, 5 Blatch. 336; Gibbs *v.* Usher, 1 Holmes 348; *In re* Turner, 3 Wall. Jr. 260; Torry *v.* Beardsley, 4 Wash. 242; Allin *v.* Robinson, 1 Dill. 119.

[3] Charter Oak Co. *v.* Star Ins. Co., 6 Blatch. 208.

[4] Gaines *v.* Fuentes, 92 U. S. 10.

[5] Parker *v.* Overman, 18 How. 137.

[6] Connor *v.* Scott, 3 Cent. L. J. 305; Dill. 242.

[7] Watson *v.* Bondurant, 2 Woods. (C. C.) 166.

[8] 6 Biss. 88.

[9] See also Clark *v.* Smith, 13 Pet. 195; Lorman *v.* Clark, 2 McLean (C. C.) 568.

[10] Grant *v.* Hamilton, 3 McLean (C. C.) 100. See also Fritch *v.* Creighton, 24 How. 159; Gibbs *v.* Usher, 1 Holmes 348.

[11] *Ex parte* Biddle, 2 Mason 472.

[12] Mewster *v.* Spaulding, 6 McLean 24.

[13] Kohl *v.* U. S., 91 U. S. 367; U. S. *v.* Block, 3 Biss. 208.

[14] United States *v.* Block, 3 Biss. 208; Railway Company *v.* Whitton, 13 Wall. 270.

If a right to sue exists at common law or by statute, the statutes of a state cannot limit the right of recovery to a state court, but it may in such cases be enforced in the proper federal court having jurisdiction under the provisions of the foregoing section.[1]

In equity suits, the jurisdiction, practice and procedure is co-extensive with and governed by the principles, rules and usages of courts of equity in England, and cannot be regulated or controlled by the jurisprudence of the state within which the suit is brought;[2] and although circuit courts, as courts of equity, may make rules and regulations for the practice, proceedings and process, mesne and final, in their respective circuits they cannot be inconsistent with the general principles or usages of the High Court of Chancery in England, or with the rules prescribed by the Supreme Court of the United States.[3]

The fact that there may be no state courts of equity, or statutory provisions providing for them, does not affect the right of the proper federal courts to take cognizance of equity suits; and they are bound to proceed in such cases according to the principles and usages of courts of equity as distinguished from courts of law.[4] But we will hereafter more particularly point out the practice and procedure in this court, in suits at law and in equity.

§ 120. **Injunctions of state courts prohibited.**—It may here be observed that writs of injunction by the courts of the United States, to stay proceedings in the state courts, are expressly prohibited by the Revised Statutes, except in cases authorized by any law relating to proceedings in bankruptcy.[5] As the bankrupt law, then in existence, has since been repealed, the exception has no virtue, but the general provision remains in full force and effect.[6]

§ 121. **The value of the matter in dispute.**—In construing the provisions of the statute relating to the value of the matter in dis-

[1] Parsons *v.* Lyman, 5 Blatchf. 170; Livingston *v.* Jefferson, 1 Brock. 203.

[2] Rev. Stat. § 913; Equity Rule 90; State of Pennsylvania *v.* Wheeling, etc., Br. Co., 18 How. 421; Robinson *v.* Campbell, 3 Wh. 212; Dodge *v.* Wolsey, 18 How. 331; Barber *v.* Barber, 21 How. 582; Livingston *v.* Story, 9 Pet. 632; Payne *v.* Hook, 7 Wall. 425; Fletcher *v.* Morey, 2 Story 555.

[3] Bank of U. S. *v.* White, 8 Pet. 262; *Ex parte* Poultney *v.* City of Lafayette, 12 Pet. 472; The Philadelphia, etc., R. Co. *v.* Stimpson, 14 Pet. 448.

[4] Gaines *v.* Relf, 15 Pet. 9; Livingston *v.* Story, 9 Pet. 632; *Ex parte* Whitney, 13 Pet. 404.

[5] Rev. Stat. § 720.

[6] The Bankrupt Act of 1867 was repealed by an act of June 7, 1878, which took effect September, 1878, except as to matters then pending in court: Acts of 45th Cong., 19 Stat.

pute, it has been held that, in an action upon a money demand, the value of the matter in controversy is the debt claimed, as stated in the body of the declaration, and not merely the damages alleged in the statement, or the amount claimed in the prayer for judgment at its conclusion.[1] The court will look to the amount claimed in the body of the complaint, and will not be governed by the amount for which judgment is prayed; and the amount of all that is claimed in all the counts of the declaration upon all the causes of action which are properly joined will be considered in determining the amount in controversy.[2]

But where a bill was filed jointly by several complainants for an injunction to restrain the collection of taxes on the property of the several complainants, levied for the purpose of constructing a railroad, and the amount severally levied upon their property was less than five hundred dollars, but collectively it exceeded that sum, the court held that as to each of the complainants it was necessary that the amount in dispute should exceed five hundred dollars; and that although they might join in the proceeding to injoin the collection of the tax, the interest of each was several; and that when it became necessary to aggregate the tax the several complainants were required to pay, to make the amount of five hundred dollars, it was insufficient to confer jurisdiction.[3] The matter in dispute must exceed five hundred dollars, and it is not sufficient that it equal that amount. Hence it is necessary to aver, in the body of the declaration, facts showing that it exceeds that sum.[4]

It is sufficient, however, if the amount in dispute exceeds five hundred dollars with interest due on the obligation sued on.[5]

The subject-matter of the suit must be something of a pecuniary value, and susceptible of a pecuniary estimate; and this necessarily excludes all controversies of a civil character relating to the cus-

[1] Lee *v.* Watson, 1 Wall. 337.

[2] Judson *v.* Macon County, 2 Dill. 213.

[3] King *v.* Wilson, 1 Dill. 555; Adams *v.* Board of Commissioners, McMahon 235; Bank of U. S. *v.* Moss, 6 How. 31.

[4] Lee *v.* Watson, 1 Wall. 337; Gordon *v.* Longest, 16 Pet. 97; Kanouse *v.* Martin, 15 How. 198; Bennett *v.* Butterworth, 8 How. 124; Payton *v.* Robertson, 9 Wh. 527; United States *v.* McDowell, 4 Cr. 316; Postmaster General *v.* Cross, 4 Wash. (C. C.) 326; Hartshorn *v.* Wright, 1 Pet. (C. C.) 64; King *v.* Wilson, 1 Dill. (C. C.) 555; Walker *v.* The United States, 4 Wall. 163.

[5] Bank *v.* Daniel, 12 Pet. 32. The same doctrine is held in cases of the removal of causes from the state courts: see McGinnity *v.* White, 3 Dill. 350; Merrill *v.* Petty, 16 Wall. 338.

tody of children, and those involving the right of personal freedom, as these matters are not susceptible of a pecuniary valuation.[1]

The requisite value of the matter in controversy is a jurisdictional fact, and it must, necessarily, be averred in the declaration or bill. There are no presumptions in favor of the jurisdiction of the federal courts, as they are specially constituted with jurisdiction in certain cases; and the facts upon which it rests must appear in some form in the record of all suits prosecuted before them. They have no jurisdiction except such as the statute confers;[2] and as the jurisdiction of the court depends upon a statute, if the statute is repealed, this takes away the jurisdiction of the court from the time of the repeal, even though there may be suits pending, unless there is a reservation of such suits.[3]

§ 122. **Suits arising under the Constitution or laws of the United States.**—One of the grounds of jurisdiction of the circuit courts is that the matter in dispute arises "under the Constitution or laws of the United States, or treaties made . . . under their authority." If the question presented to the court is whether a state law is in conflict with any provision of the federal Constitution, this would evidently be within the provisions of the act, and give the circuit courts original jurisdiction. In such a case a correct decision would depend upon a proper construction of the Constitution, and this would give the proper circuit court jurisdiction.[4] If a state law is in conflict with the Constitution of the United States, and a state officer is about to execute it, this would be a proper case for the exercise of the original jurisdiction of a circuit court to restrain him. And the court may proceed in such a case to a decree against an officer of the state in all respects as if the state were a party to the record.[5]

[1] Lee *v.* Lee, 8 Pet. 44; Barry *v.* Mercien, 5 How. 103; Sparrow *v.* Strong, 3 Wall. 97; Gaines *v.* Fuentes, 92 U. S. 10; Pratt *v.* Fitzhugh, 1 Black. 271; DeKraft *v.* Barney, 2 Id. 704; Green *v.* U. S., 9 Wall. 655; Rison *v.* Cribbs, 1 Dill. 181.

[2] Sheldon *v.* Sill, 8 How. 441; United States *v.* Eckford, 6 Wall. 484; Carey *v.* Curtis, 3 How. 236; Wisconsin *v.* Duluth, 2 Dill. 206; Hubbard *v.* Northern R. Co., 3 Blatchf. 84; Dred Scott *v.* Sanford, 19 How. 393.

[3] Insurance Co. *v.* Ritchie, 5 Wall. 541; Norris *v.* Crocker, 13 How. 429.

[4] Cohens *v.* Virginia, 6 Wh. 264; Owings *v.* Norwood, 5 Cr. 344; Osborne *v.* Bank of U. S., 9 Wh. 738. See also Cook *v.* Moffatt, 5 How. 295; Abb. Nat. Dig. Lit. Const. Law.

[5] Osborne *v.* Bank of U. S., 9 Wh. 738; Dodge *v.* Wolsey, 18 How. 331; State Bank *v.* Knoop, 16 How. 369; Jefferson Bank *v.* Skelly, 1 Black.

§ 123. Controversy between citizens of different states.—If the suit and the amount in dispute is within the provisions of the statute, and it appears from the declaration or bill that the "controversy is between citizens of different states," the circuit court has original jurisdiction.

Under similar provisions of the Judiciary Act (1789), it was held that the statute meant that each distinct interest should be represented by parties, all of whom might sue and be sued in the federal courts; and that where the interest of either party was joint, each of the persons interested must have the requisite citizenship to sue or be sued in those courts, and that the circuit courts would have no jurisdiction if some of the defendants were citizens of the same state with the plaintiffs.[1]

And under a subsequent act, which provided "that where, in any suit at law or in equity commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the nonjoinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit," it was held that the joinder of a defendant, who was a citizen of the same state with the plaintiff, and who was duly served with original process, with others who were not citizens of the same state, would oust the court of jurisdiction.[2]

436; Ohio L. and F. Co. *v.* Debold, 18 How. 380; Davis *v.* Grey, 16 Wall. 203.

In Bennett *v.* Boggs, 1 Bald. 60, the question of the constitutionality of a state law was the matter in controversy. It was held that the legislature of a state had paramount authority to legislate and regulate its fisheries unless restrained by its constitution, and that a common law right of fishery may be taken away by legislative prohibition, as it is not a right founded upon contract, or secured by the federal or state constitutions. See also Livingstone *v.* Moore, 1 Bald. 424.

[1] Strawbridge *v.* Curtis, 3 Cr. 267; Ward *v.* Arredondo, 1 Paine (C. C.) 410. See also Commercial Bank *v.* Slocomb, 14 Pet. 60; Coal Co. *v.* Blatchford, 11 Wall. 172.

[2] Act of February 28, 1839, 5 Stat. at Large 321; Ketchum *v.* Farmers', etc., Co., 4 McLean 1. See also Coal Co. *v.* Blatchford, 11 Wall. 172; Case of the Sewing Machine Co., 18 Wall. 553; Doremus *v.* Bennett, 4 McLean 224.

One of the provisions for jurisdiction under the act of 1875 is that there "be a controversy between citizens of different states." In construing this language, the Supreme Court has held that, if there is a controversy between citizens of different states, about which the suit is brought, it is immaterial as to the position of the parties on the record or in the pleadings as plaintiffs or defendants; and that in determining the question of jurisdiction the court might "ascertain the real matter in dispute and arrange the parties on one side or other of that dispute; and that if in such arrangement it appeared that those on one side were all citizens of different states from those on the other, jurisdiction might be entertained and the cause proceeded with."[1]

§ 124. Who are citizens.—A citizen, in the sense of the statute, is one who resides in, and is an inhabitant of, the state. It is evident that he need not possess the qualifications which would enable him to exercise the election franchise or hold real estate. Those who have resided in and been inhabitants and citizens of one state, within the meaning of the statute, may remove to another state to remain either temporarily or permanently, and various matters connected therewith may properly be considered in determining the question of citizenship. It has been held that, on the removal of a citizen from one state to another, citizenship may depend upon his intentions. The exercise of the right of suffrage in such a case in the state where he resides would perhaps ordinarily be conclusive upon the subject; but even where the right of suffrage has not been exercised, the acquiring of the right so to do, accompanied by such acts as indicate a permanent location, would be quite satisfactory on this question. And where an individual who is a citizen of the United States has resided in a state for a considerable length of time, during which he has there been engaged in business, he may well be presumed to be a citizen of such state, unless circumstances appear to the contrary.[2]

[1] The Pacific Railroad *v.* Ketchum, 101 U. S. 290. The same doctrine was maintained in Removal Cases, 100 U. S. 457, the latter construing the same language in the second section of the same act, relating to the removal of causes.

[2] Prentiss *v.* Barton, 1 Brock. 389; Cooper *v.* Galbraith, 3 Wash. 546; Gardner *v.* Sharp, 4 Wash. 609; De Wolf *v.* Rabaud, 1 Pet. 476; Shelton *v.* Tiffin, 6 How. 163. There was, however, an exception to this rule in case of negroes of the African race, before slavery in this country was abolished. In 1856 the Supreme Court of the United States determined that a free negro of the African race

Under the Judiciary Act of 1789 it was held that a citizen of the District of Columbia was not a citizen of a state within the meaning of that act, and that he could not maintain an action against a citizen of a state in the circuit court.[1] Nor could a citizen of a territory, under that act, sue a citizen of a state in the federal courts, when the jurisdiction depended upon citizenship of the parties; as a citizen of a territory is not a citizen of a state within the meaning of the statute.[2] The circuit courts have no jurisdiction of a case, either at law or in equity, in which the plaintiff and defendant are citizens of the same state, as neither the judiciary acts of Congress nor the Constitution of the United States confers jurisdiction in such cases.[3]

§ 125. **Parties, merely nominal or formal.**—If the real controversy is between citizens of different states, the fact that there are merely formal or nominal parties to it, who have not the requisite citizenship, does not affect the jurisdiction of the court. "Where the real and only controversy is between citizens of different states, or an alien and a citizen, and a plaintiff by some positive rule of law is compelled to use the name of another to perform some ministerial act, who has not and never had any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the real controversy and litigation before them exists."[4] So where certain parties

whose ancestors were brought to this country and sold as slaves could not be a citizen within the meaning of the federal judiciary acts: Dred Scott *v.* Sanford, 19 How. 393.

[1] Hepburn *v.* Ellzey, 2 Cr. 445; Barney *v.* Baltimore City, 6 Wall. 280. But see Sere *v.* Pitot, 6 Cr. 332; Railroad Co. *v.* Harris, 7 Wall. 574.

[2] New Orleans *v.* Winter, 1 Pet. 91. Where the plaintiff was a native of New York, but had resided and done business in Canada for thirty years, and resided there at the time of bringing this suit and had taken an oath of allegiance to the queen of Great Britain, and the defendant was a citizen of Canada, it was held that the circuit court of New York had no jurisdiction of the case, as the plaintiff was not a citizen of the state. This suit was, of course, based upon the citizenship of the plaintiff and the alienage of the defendant: Prentiss *v.* Brennan, 2 Blatch. (C. C.) 162.

[3] North Carolina *v.* Dewey, 1 Hughes 133; Gale *v.* Babcock, 4 Wash. (C. C.) 199; Osborn *v.* U. S. Bank, 9 Wh. 738; Cohen *v.* Virginia, 6 Wh. 264; Martin *v.* Hunter, 1 Wh. 237. If property of a state is in the hands of an officer or agent as trustee, and the officer or agent is within the jurisdiction of the court, it may take jurisdiction of the suit without requiring the state to be a party: Swasey *v.* North Carolina R. Co., 1 Hughes 17; Osborne *v.* U. S. Bank, 9 Wh. 738.

[4] Opinion of Mr. Justice Clifford in Walden *v.* Skinner, 101 U. S. 577. See also Mr. Justice Miller in Arapahoe Co. *v.* Kansas Pacific R. Co., 4 Dill. 277; Harvey *v.* The Illinois Mid. R. Co., 7 Biss. 103; Davis *v.* Grey, 16 Wall. 203. See also Weed Sewing Machine Co. *v.* Wicks, 3 Dill. 261.

had only a nominal interest, and they resided beyond the jurisdiction of the court, it was held error to dismiss the bill on the ground that they were not made parties, where all the parties who had a beneficial interest were in court. The court, in such a case, should proceed to a decree against the defendants if equity requires it.[1] If the parties are not indispensable, and the court has no jurisdiction over them for want of proper citizenship, they may be dismissed, if a decree can be made without prejudice to their rights, and the court may retain jurisdiction as to the other parties to the bill.[2]

§ 126. **The proper citizenship of the parties should appear in the record.**—It is a general if not a universal rule that where jurisdiction depends upon citizenship, the proper citizenship of the parties should appear in some manner in the record, as the federal courts are all courts of defined and limited jurisdiction, and no presumptions will be made in favor of them.[3] Under the act of 1789, in cases where jurisdiction depended upon citizenship, it was necessary for the declaration or bill to show not only that the parties were citizens of different states, but that one of them was a citizen of the state where the suit was brought. But under the act of March 3, 1875, it is sufficient, where jurisdiction depends upon citizenship, if it appears from the record that the controversy is between citizens of different states. And under this act the courts will not regard the position of the parties on the record, as plaintiffs or defendants, as determining the question whether the controversy is between citizens of different states, but will ascertain the real matter in dispute and arrange the parties on one side or the other of that matter, as circumstances seem to require; and if after such arrangement it appears that those on one side are all citizens of different states from all those on the other side, the court has jurisdiction.[4]

Circuit and district courts have such powers only as have been

[1] Union Bank *v.* Stafford, 12 How. 327; Wood *v.* Davies, 18 How. 467; Ward *v.* Arredondo, 1 Paine 410.

[2] Horn *v.* Lockhart, 17 Wall. 570. See also Vattier *v.* Hinde, 7 Pet. 252; Mollan *v.* Torrance, 9 Wh. 537; Cameron *v.* McRoberts, 3 Wh. 591; Connolly *v.* Taylor, 2 Pet. 556.

[3] McCormic *v.* Sullivant, 10 Wh. 192; De Wolf *v.* Rabaud, 1 Pet. 476; *Ex parte* Smith, 94 U. S. 455; Hornthall *v.* The Collector, 9 Wall. 560; Bingham *v.* Cabot, 3 Dall. 382: Gassies *v.* Ballon, 6 Pet. 761; Eberley *v.* Moore, 24 How. 157; Christmas *v.* Russell, 5 Wall. 290; Mason *v.* Rollins, 13 Wall. 602. It cannot be inferred argumentatively: Brown *v.* Keene, 8 Pet. 115.

[4] The Pacific Railroad *v.* Ketchum, 101 U. S. 289.

conferred upon them by acts of Congress not inconsistent with the Constitution of the United States.[1]

§ 127. **Nominal and formal parties.**—It is a doctrine recognized by the federal courts that the jurisdiction of the courts is not affected by merely nominal and formal parties who are without the requisite citizenship, if the real matter in controversy is between parties having a proper citizenship.[2] And if it appears that the real controversy is between citizens of different states, or an alien and a citizen, and the plaintiff is by some positive rule of law compelled to use the name of another to perform merely a ministerial act who has not, nor ever had, any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists.[3]

§ 128. **Evidences of citizenship; persons of African descent.**—A person who resides within a state and has carried on business within the same for a considerable length of time would be presumed to be a citizen of the same, in the absence of evidence to the contrary. In case of a recent removal of a person from one state to another, citizenship may depend upon the circumstances and the intentions of the parties. The exercise of the right of suffrage would ordinarily be quite conclusive of the latter; and if a party acquires the right of suffrage in a state to which he has removed, accompanied by acts and conduct indicating a permanent location, this may be quite satisfactory evidence of citizenship.[4] But it was held, during the time that slavery existed in this country, that a free negro of African descent, whose ancestors were brought to this country and sold as slaves, could not become a citizen.[5]

§ 129. **Executors and administrators.**—If executors or administrators are personally qualified by their citizenship to bring suit in the circuit courts, the jurisdiction will not be defeated by the fact that the parties whom they represent would be disqualified from

[1] United States *v.* Eckford, 6 Wall. 484; Seldon *v.* Still, 8 How. 441; United States *v.* Clark, 8 Pet. 444; Briscoe *v.* Bank, 11 Pet. 257; Harrison *v.* Hadley, 2 Dill. 229; United States *v.* Hudson, 7 Cr. 52.

[2] Browne *v.* Strode, 5 Cr. 303; Wormley *v.* Wormley, 8 Wh. 421; McNutt *v.* Bland, 2 How. 1; Coal Co. *v.* Blatchford, 11 Wall. 172; Arapahoe County *v.* Kansas Pacific R. Co., 4 Dill. 277; Hervey *v.* Illinois Mid. R. Co., 7 Biss. 103; Wood *v.* Davis, 18 How. 467; Union Bank *v.* Stafford, 12 Id. 327.

[3] See *ante*, § 125, Walden *v.* Skinner, 101 U. S. 577.

[4] Shelton *v.* Tiffin, 6 How. 163.

[5] Dred Scott *v.* Sanford, 19 How. 393.

bringing suit on account of their citizenship.[1] So the jurisdiction of the circuit court cannot be defeated by the fact that with the principal defendant are joined, as nominal parties, the executors of a deceased trustee who are citizens of the same state as the complainant, where the bill only requires of them the ministerial act of conveying title to the lands in controversy, if the power so to do is vested in them by the laws of the state where the suit is brought.[2] So an administrator who is a resident of one state may sue a citizen of another state in the circuit court of the state where he resides, although letters of administration were granted in the latter state.[3] So if a receiver of a corporation is a citizen of a state other than that of the defendant, he may sue in this court in the state where the latter resides, although the corporation is a citizen of the same state with the defendant.[4]

§ 130. **Parties having only equitable interests.**—The circuit court, in determining its jurisdiction, based upon the proper residence of parties, will not, in suits at law, always inquire into the residence of those who may have a mere equitable interest in the matter in controversy.[5] But trustees cannot maintain a bill to foreclose a trust deed or mortgage, where one of them is a citizen of the same state with the defendant, although the *cestui que trusts* are citizens of another state.[6]

§ 131. **Where citizenship in equity not important.**—In proceedings in equity the citizenship of the parties is not always important in determining the jurisdiction of the court. Thus where a bill was filed in the circuit court to stay proceedings at law in the same court, the equity suit was held to be auxiliary to the action at law, and maintainable without regard to the citizenship or alienage of either party to the record. But the complainant in such a case can maintain the suit for any other relief or for any other purpose, without showing the proper residence of the parties, as required by the statute.[7]

[1] Coal Co. *v.* Blatchford, 11 Wall. 172.

[2] Walden *v.* Skinner, 101 U. S. 577.

[3] Rice *v.* Houston, 13 Wall. 66. See also Walker *v.* Beal, 3 Cliff. 155; Weed Sew. M. Co. *v.* Weeks, 3 Dill. 261.

[4] Farlow *v.* Lea, C. L. B. 329.

[5] Bonnafee *v.* Williams, 3 How. 574; Smith *v.* Kernochen, 7 Id. 198.

[6] Coal Co. *v.* Blatchford, 11 Wall. 172. See also Hotel Co. *v.* Wade, 97 U. S. 13. But see Browne *v.* Browne, 1 Wash. 429.

[7] St. Luke's Hospital *v.* Barclay, 3 Blatch. 359; Simms *v.* Guthrie, 9 Cr. 19; Dunn *v.* Clark, 8 Pet. 3. If citizenship of the parties gives the circuit court jurisdiction, a party having a legal right to maintain an action at

Where a bill was filed in order to procure a construction of orders, decrees and acts done or made by the court in which it was filed, it was held proper, although the parties interested in having the construction made would not, for want of proper citizenship, be entitled to proceed by an original bill of any kind in such court.[1] So, where a party had obtained judgment at law in the circuit court of the state of Michigan against a citizen of that state, he at the time being a resident of the state of New York, and afterwards, having moved to the state of Michigan, where the defendant still resided, filed a bill of discovery in aid of execution in the same court where the original judgment was obtained, to which there was a demurrer for want of jurisdiction, the court held that the change of residence of the plaintiff to the state of Michigan, after the commencement of the original suit, did not oust the court of jurisdiction in this auxiliary proceeding.[2] But in such a case it should appear from the averments of the bill that the matter has already been litigated in the same court by the same persons, and is in addition and auxiliary or ancillary to such original suit; otherwise the circuit court would have no jurisdiction.[3] If the bill is not an original one, but a bill of revivor filed on the death of the original complainant, this court has jurisdiction of the suit, if it had original jurisdiction, even though the complainant in the last proceeding may be a resident of the same state as the defendant.[4]

If a bill be filed to set aside a judgment of the court on the ground of fraud, the court has jurisdiction, although both parties thereto are citizens of the same state.[5] And where the interest of parties becomes complicated by protracted litigation, and it is necessary to prevent a failure of justice, the circuit court will take cognizance of a bill for the purpose of settling the rights and protecting the interests of the parties, without regard to the citizenship of the parties. But the jurisdiction in such cases

law will not be defeated for the want of proper citizenship of persons who have mere equitable interests: Bonafee *v.* Williams, 3 How. 574.

[1] Minnesota Co. *v.* St. Paul Co., 2 Wall. 609.

[2] Hatch *v.* Dorr, 4 McLean 112. See also Reilly *v.* Golding, 10 Wall. 56; Clarke *v.* Mathewson, 12 Pet. 164.

[3] Christmas *v.* Russell, 5 Wall. 290.

[4] Dunn *v.* Clarke, 8 Pet. 1; Morgan *v.* Morgan, 2 Wh. 290; Mollan *v.* Torrance, 9 Id. 537; Jones *v.* Andrews, 10 Wall. 337; Logan *v.* Patrick. 5 Cr. 288; Simms *v.* Guthrie, 9 Id. 19.

[5] O'Brien Co. *v.* Brown, 1 Dill. 588; Simms *v.* Guthrie, 9 Cr. 19. See also Osborne *v.* Mich. Air L. R. Co., 11 C. L. N. 367.

would rest upon the ground that they were merely auxiliary to former suits.[1]

§ 132. **When parties may be dismissed.**—If the court has no jurisdiction over parties to a suit for want of proper citizenship, and they are not indispensable, and a decree can be rendered as to the other parties without prejudice to them, they may be dismissed, and the court proceed to determine the cause between the remaining parties.[2] Nor will the court inquire into the residence of those who have a mere equitable interest in the subject in controversy, where the plaintiff has a legal right to sue, and where, so far as the legal right is concerned, the parties to the controversy have the requisite citizenship.[3]

§ 133. **Corporations are citizens.**—In the construction of the Constitution and of acts of Congress conferring jurisdiction on the federal courts on the grounds of citizenship of the parties, corporations have come to be regarded as citizens within the meaning of the law; it being conclusively presumed that the members of the corporations are residents of the state creating them, or under whose laws they were organized. And a suit brought by a citizen of one state against a corporation in the circuit court of the state where it was created or organized, other than that of the residence of the plaintiff, is a suit between citizens of different states, notwithstanding members or stockholders of the corporation may reside in the same state with the plaintiff.[4]

If railroad corporations created by or under the laws of different states are consolidated, and the railroad is operated by virtue of that consolidation as one continuous entire line of road, the corporation thus consolidated may be treated for the purpose of jurisdiction as a citizen of either state; and if a corporation is created under the laws of two states, a citizen of one of these states may, so far as citizenship is concerned, sue it in the other.[5]

[1] Cornwell *v.* White Water, etc., R. Co., 4 Biss. 195; Barth *v.* McKeever, 4 Id. 206; Freeman *v.* Howe, 24 How. 450; Minnesota R. Co. *v.* St. Paul R. Co., 2 Wall. 609. But see also Dunn *v.* Clarke, 8 Pet. 1; Stone *v.* Bishop, 4 Cliff. 593.

[2] Horn *v.* Lockhart, 17 Wall. 570; Mollan *v.* Torrance, 9 Wh. 537; Connolly *v.* Taylor, 2 Pet. 556; Vattier *v.* Hinde, 7 Pet. 252.

[3] Bonnafee *v.* Williams, 3 How. 574; Smith *v.* Kernochen, 7 How. 198.

[4] Ohio & Miss. R. R. Co. *v.* Wheeler, 1 Black. 296; Louisville R. R. Co. *v.* Letson, 1 How. 497; Marshal *v.* Baltimore, etc., R. R. Co., 16 How. 314; Covington, etc., Co. *v.* Shepherd, 21 How. 212; Railroad *v.* Harris, 12 Wall. 65; Railroad Co. *v.* Whitton, 13 Wall. 270.

[5] Railway Co. *v.* Whitton, 13 Wall.

§ 134. **Burden of proof of citizenship of corporations.**—Where a suit was brought against a corporation in a state court which was removed by the corporation to a circuit court of the United States on the ground that it was a controversy between citizens of different states, on motion of plaintiff to remand the cause it was held that the burden of proof was on the corporation to show that it was not a citizen of the same state with the plaintiff, and that it was generally incumbent upon the suitors who invoke the jurisdiction of the courts of the United States to show that they are within its jurisdiction.[1]

If a corporation has appeared generally in an action, it cannot afterwards deny the jurisdiction of the court on the ground that original process was not duly served upon it in the district of which it was an inhabitant at the time of service.[2] Nor can a circuit court be ousted of jurisdiction by a stipulation of a foreign corporation that process issued in any suit brought against said corporation may be served upon any of its agents with like effect as if service had been made on the company within the state.[3]

§ 135. **When the United States are plaintiffs.**—When the United States are plaintiffs or petitioners, the circuit court has jurisdiction, if the amount in controversy exclusive of costs exceeds five hundred dollars.[4]

It has been held that an act of Congress was not necessary to enable the United States to sue; that they have an inherent right to sue in their own name, unless a different mode is prescribed by statute;[5] and that if they sue on commercial paper they have all the rights and are subject to all the responsibilities of individuals who are parties to such instruments.[6] So in relation to the proprietorship of real or personal property, the United States have the

270; Muller *v.* Dows, 94 U. S. 444; St. Louis, etc., R. R. Co. *v.* Ind. & St. Louis R. R. Co., 12 C. L. A. 73. In such case the citizen of a state other than either of the states under whose laws the corporation was created may sue it in the circuit court for either, where the directors generally meet to transact business: Culbertson *v.* Wabash N. Co., 4 McLean 544.

[1] Copeland *v.* The Memphis & Charleston R. Co., 3 Woods. (C. C.) 651.

[2] Kelsey *v.* Pennsylvania R. R. Co., 14 Blatch. 89. See also Gracie *v.* Palmer, 8 Wh. 699; Pollard *v.* Pickett, 4 Cr. 421.

[3] *Ex parte* Schollenberger, 96 U. S. 369.

[4] Rev. Stat. § 629, sub. 2 and 3; act March 3, 1875, § 1.

[5] United States *v.* Baker, 1 Paine 156. See also United States *v.* Baker, 12 Wh. 589.

[6] United States *v.* Bank of the Metropolis, 15 Pet. 377; United States *v.* Dunn, 6 Pet. 51; The Floyd Acceptances, 7 Wall. 666.

same rights and remedies, and are subject to similar liabilities in managing and dealing with it through their agents, as natural persons.[1] So the United States courts have jurisdiction in case of suits on bonds of the agents or officers of the United States, given in pursuance of the statutes of the United States.[2] And where a bond was given by a postmaster to the Postmaster-General of the United States, it was held that the Postmaster-General could maintain an action in his own name in the circuit court of the United States on the bond.[3]

§ 136. **Where citizens of the same state claim lands under grants of different states.**—Under the present statutes, if the amount in controversy is sufficient, the circuit courts may take cognizance of cases where the parties to a controversy are citizens of the same state, provided they claim lands under grants from different states. The Constitution contained this provision, as well as the act of 1789, under which it was held that the circuit court in Vermont had jurisdiction where both parties were residents of that state, and one party claimed land under a grant from the state of New Hampshire, and the other under a grant from the state of Vermont, although, at the time of the first grant, Vermont was a part of the state of New Hampshire.[4] So it was held that the jurisdiction of a circuit court extended to a controversy between citizens of Kentucky claiming lands under different grants,—one under a grant from the state of Kentucky,—but upon warrants issued by the state of Virginia, and locations founded thereon prior to the separation of Kentucky from Virginia, and the other based upon a grant from the state of Virginia. The court in this case, in construing the Constitution and the act of Congress, held that it was the grant that gave the title and jurisdiction.[5]

§ 137. **Controversy between citizens of a state and foreign states, citizens or subjects.**—Under the provisions of the statute, which is also the language of the Constitution on the same subject, it has been decided that where both the plaintiff and defendant were

[1] Neilson *v.* Lagow, 12 How. 98; United States *v.* Tingey, 5 Pet. 115; United States *v.* Bradley, 10 Pet. 343; United States *v.* Hage, 6 How. 279; s. c., 13 How. 478.

[2] Smith *v.* United States, 5 Pet. 293; Farrar *v.* United States, 5 Pet. 373.

[3] Postmaster-General *v.* Early, 12 Wh. 136.

[4] The Town of Parolet *v.* Clark, 9 Cr. 292 (1815); act March 3, 1875, ch. 137, § 1, 18 Stat. L. 470.

[5] Colson *v.* Lewis, 2 Wh. 377. See also the Bank of the U. S. *v.* Devereux, 5 Cr. 61 (1809).

aliens, a federal court would have no jurisdiction.[1] The provisions of the first section of the act of 1875, conferring powers upon the circuit courts, follow the language of the Constitution. And we shall hereafter notice more particularly that the language of the second section of the act relating to the removal of causes from the state courts to the circuit courts is similar to the language of the section we are considering, so that if by reason of the proper citizenship of the parties a suit may be brought originally in a circuit court, for the same reason may a cause originally commenced in a state court be removed to the circuit court.[2] But we will hereafter consider the subject of the removal of causes from the state courts to the circuit courts of the United States.

In case of the alienage of one party, the other party must be a citizen in order to confer jurisdiction on the ground of proper citizenship; and these facts, as well as all other jurisdictional facts, should be averred in the pleadings.[3] Where the alienage of one party is the ground of jurisdiction, it should be not only so averred, but also that he is a citizen or subject of some one foreign state.[4] But an alien legatee or executor may sue an executor who is a citizen of the state where the suit is brought, although the testators whom they represent were both citizens of the same state.[5]

§ 138. **Exclusive cognizance of crimes.**—The first section of the act of March 3, 1875, provides that the circuit courts "shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein."

The criminal jurisdiction of the circuit court is expressly conferred by this provision, which is the language of the Judiciary Act of 1789,[6] and of the Revised Statutes on the same subject.[7]

The federal courts have no jurisdiction in criminal cases, except

[1] Montalet *v.* Murray, 4 Cr. 46; Mossman *v.* Higginson, 4 Dall. 12; Piquignot *v.* The Pennsylvania R. Co., 16 How. 104; Hinckley *v.* Byrne, 1 Deady 224.

[2] Act of 1875, §§ 1, 2.

[3] Montalet *v.* Murray, 4 Cr. 46; Prentiss *v.* Brennan, 2 Blatch. (C. C.) 162; Rateau *v.* Bernard, 3 Blatch. 244; Daniel *v.* Twentyman, 2 Pet. 146.

[4] Wilson *v.* City Bank, 3 Sum. 422; Breithaupt *v.* Bank, 1 Pet. 238. See also Breadlove *v.* Nicolet, 7 Pet. 413; Jones *v.* McMasters, 20 How. 8; Weems *v.* George, 13 How. 190; Bonaparte *v.* Camden and A. R. Co., 1 Bald. (C. C.) 205; United States *v.* Hall, 98 U. S. 343.

[5] Chappedelaine *v.* Dechenaux, 4 Cr. 306.

[6] Judiciary Act of 1789, sec. 2; 1 Stat. at Large 78.

[7] Rev. Stat. § 629, sub. 20.

such as is expressly conferred upon them by the Constitution and the acts of Congress, and they can try no offences except such as are permitted by said Constitution and acts.[1] They have, strictly speaking, no common law jurisdiction.[2]

The jurisdiction of the circuit courts is expressly made concurrent with the district courts of crimes and offences cognizable therein. It is important, therefore, to understand the facts and circumstances under which the district court may exercise jurisdiction in such cases.

The statute provides, in reference to the criminal jurisdiction of the district courts, as we have already seen, that they shall have jurisdiction "of all crimes and offences cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which shall not be capital, except in the cases mentioned in section 5412, title Crimes."[3]

The state courts have no jurisdiction of offences committed against the laws of the United States, and no part of the judicial power of the United States can consistently be delegated to the state courts.

It sometimes occurs that the same act is a transgression, not only of a law of the United States, but of a statute of a state. Thus it may be an offence under a state law to pass counterfeit coin, although the same act is an offence under an act of Congress. In such a case a conviction and punishment under the state law is no bar to a prosecution under the act of Congress.[4] So where an assault upon a marshal, or a hindering of him in the execution of process, is an offence against the laws of the United States, as well as of the state where the offence is committed, he may be tried and convicted by both, and a conviction by either would be no bar to a prosecution and conviction by the other.[5]

[1] United States *v.* Barney, 5 Blatch. 294 (1866).

[2] *Ex parte* Bollman, 4 Cr. 75; United States *v.* Hudson, 7 Cr. 32; United States *v.* Coolidge, 1 Wh. 415; United States *v.* Wilson, 3 Blatch. 435; United States *v.* Lancaster, 2 McLean 431; United States *v.* Irwin, 5 McLean 178; United States *v.* Worrell, 2 Dall. 384; United States *v.* Reese, 4 Saw. 629.

[3] Rev. Stat. § 563, sub. 1.

[4] Fox *v.* Ohio, 5 How. 410; Prigg *v.* Pennsylvania, 16 Pet. 540; City of New York *v.* Miln, 11 Pet. 142; Barron *v.* Baltimore, 7 Pet. 243; Huston *v.* Moore, 5 Wh. 1; White *v.* Commonwealth, 4 Bin. 418; Stearns *v.* United States, 2 Paine (C. C.) 300; United States *v.* Holliday, 3 Wall. 407.

[5] Moore *v.* The State of Illinois, 14 How. 13. See also The United States *v.* Bevans, 3 Wh. 336.

§ 139. **Cognizance of crimes where the punishment is death.**—We have observed that the circuit court has exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where it is otherwise provided by law, and concurrent jurisdiction with the district court of all offences cognizable therein. As the district courts have jurisdiction of all crimes and offences cognizable under the authority of the United States committed in their respective districts, or upon the high seas, "the punishment of which is not capital," etc., it follows that the circuit courts have cognizance of all capital offences, except where otherwise provided by law. The exception embraces those cases that, under the provisions of the statute, are triable by a general court-martial for offences committed by a person while in the service of the army or navy of the United States.[1]

There are, however, several offences under the statutes of the United States punishable by death, of which the circuit courts of the United States have exclusive cognizance. These offences embrace piracy upon the high seas,[2] and accessories thereto;[3] treason;[4] and murder in certain places within the territorial or maritime jurisdiction of the United States.

Section 5339 of the Revised Statues provides: Every person who commits murder—

First. Within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States;

Second. Or upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state;

Third. Or who, upon any such waters, maliciously strikes, stabs, wounds, poisons or shoots at any other person, of which striking, stabbing, wounding, poisoning or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death.[5]

[1] Rev. Stat. § 1342, art. 58; § 1624, art. 4. As to criminal jurisdiction of the circuit courts, see further, United States *v.* Holliday, 3 Wall. 407; Same *v.* Donlan, 5 Blatch. 284.

[2] Rev. Stat. § 5323.

[3] Id. § 5324.

[4] Id. § 5331.

[5] Rev. Stat. § 5339; The United States *v.* Bevans, 3 Wh. 336. For further construction of the language of this act, see U. S. *v.* McGill, 4 Dall. 426; U. S. *v.* Furlong, 5 Wh. 184; U. S. *v.* Holmes, 5 Wh. 412; U. S. *v.*

§ 140. **Capital cases remitted from the district to circuit courts.**—As capital offences cannot be tried by the district courts, it is provided by statute that "every indictment of a capital offence presented to a district court, together with the recognizances taken therein, shall, by order entered on the minutes, be remitted to the next session of the circuit court for the same district; and on the filing of such order and indictment with the clerk of such circuit court, that court shall proceed thereon in the same manner as if said indictment had been originally found and presented therein."[1]

It is obvious that cases must occur where there may be some uncertainty as to the character of the offence, as whether it is capital or otherwise; and where it is developed before a grand jury of the district court that it is a capital one, the provision of the foregoing section, which authorizes the finding and presenting of an indictment therefor to the district court, and the remittal of the same to the circuit court of the same district, is manifestly wise and beneficent.

For forms of indictments, see *post*, Nos. 188, 189, 190.

§ 141. **Offences on the high seas, where triable.**—The trial of offences committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district must be in the district where the offender is found or into which he is first brought.[2]

The foregoing provision of the Revised Statutes last cited is a substantial re-enactment of former acts of Congress, under which it has been held that in order to confer jurisdiction upon a federal court in such cases it must appear, not only that the accused was first apprehended in or first brought into the district where the trial is had, but that the offence was committed out of the jurisdiction of any state, and not within any other district of the United States. This is a matter for the jury to determine. And where they merely found that the offence was committed at a certain place designated in the indictment, but omitted to find that this place was outside the limits of any state, the verdict was set aside.[3]

Marchant, 12 Wh. 480; U. S. *v.* Douglass, 2 Blatch. 207; U. S. *v.* Magill, 1 Wash. 463; U. S. *v.* Ross, 1 Gallis. 624; U. S. *v.* Cornell, 2 Mas. 91; U. S. *v.* Ferman, 4 Mas. 505.

[1] Rev. Stat. § 1039. We shall hereafter consider the power to remit in other cases, not only from the district to the circuit courts, but also from the circuit to the district courts: Rev. Stat. §§ 1037, 1038.

[2] Rev. Stat. § 730.

[3] United States *v.* Jackalow, 1 Black. 484. See also United States *v.* Arwo, 19 Wall. 486; United States *v.* Baker, 5 Blatch. 6. See also ch. xxi., note to § 730 of Rev. Stat.

§ 142. **Offences in other cases, where triable.**—It is further provided by statute that in other cases, "the trial of offences punishable with death shall be had in the county where the offence was committed, where that can be done without great inconvenience;"[1] and that, "when any offence against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed there."[2] The latter provision, it is manifest, applies as well to district as to the circuit courts of the United States. The statutory provisions referred to clearly point out the particular forum that has cognizance of offences against the laws of the United States, whether capital or otherwise.

§ 143. **Where a civil suit must be brought.**—"No civil suit can be brought before either a circuit or district court, against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings, except as hereinafter provided."[3] This prohibition has been a part of the statutes since the adoption of the Judiciary Act of 1789. The service should be personal. The want of proper service may, however, be waived by entering an appearance to the suit.[4] It is not necessary to aver on the record that the defendant is an inhabitant of the district, and when he appears without objection it is an admission of the regularity of service.[5]

§ 144. **Attachment of property will not confer jurisdiction.**—If the defendant is not an inhabitant of the district where the suit is brought, nor served with original process therein, jurisdiction cannot be acquired by means of an attachment of his property within the district under the statutes of the state.[6] Nor can the process of foreign attachment be properly issued where the defendant is

[1] Rev. Stat. § 729.

[2] Rev. Stat. § 731. "No person shall be arrested in one district for trial in another in any civil action before a circuit or district court:" act of March 3, 1875, § 1.

[3] Act of March 3, 1875, § 1.

[4] Levy *v.* Fitzpatrick, 15 Pet. 167; Toland *v.* Sprague, 12 Pet. 300; Harrison *v.* Rowan, 1 Pet. (C. C.) 489.

[5] Gracie *v.* Palmer, 8 Wh. 605; Pollard *v.* Pickett, 4 Cr. 421.

[6] Day *v.* Newark Man. Co., 1 Blatch. 628; Caffee *v.* Hayward, 20 How. 208; *Ex parte* Railway Company, 103 U. S. 794. In this case the court held that a judgment of the circuit court relating to its jurisdiction would not be reviewed upon a petition for a mandamus.

domiciled abroad, though a citizen of the United States, if he is not duly served with original process within the district.[1] Nor can a party be said to be found within the district, or properly served there, who has been inveigled into it for the purpose of making service there, by the false representations or deceitful contrivances of the plaintiff, or who is there merely to attend the trial of a case to which he is a party, or to plead to an indictment against him.[2]

§ 145. Where service may be had by publication.—Section 8 of the act of March 3, 1875, provides: "That when in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property found within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six successive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time to be allowed by the court in its discretion, and upon proof of the service or publication of said order, and the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and to proceed to a hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants, without appearance, affect only the property which shall have been the subject of the suit, and under the jurisdiction of the

[1] Toland *v.* Sprague, 12 Pet. 300; Mauldin *v.* Carrol, 3 Hughes 249; Picquet *v.* Swan, 5 Mason 35; Sadler *v.* Hudson, 2 Curt. 6.

[2] Union Sugar Refinery *v.* Mathieson, 2 Cliff. 304; Parker *v.* Hotchkiss, 1 Wall, Jr., 267; Smith *v.* Little, 5 Biss. 159; Steiger *v.* Bonn, 4 Fed. Rep. 17; s. c., 13 C. L. N. 60; Juneau Bank *v.* McSpedden, 5 Biss. 64; U. S. *v.* Bridgman, 8 A. L. Rec. 541.

court therein within said district. And where a part of said real or personal property against which such proceedings shall be taken shall be within another district, but within the same state, said suit may be brought in either district in said state; *provided, however*, that any defendant or defendants not actually personally notified, as above provided, may at any time within one year after any final judgment in any suit mentioned in this section enter his appearance in said suit in said circuit court; and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment, according to law."[1]

There can be no doubt that this section repeals, by implication, section 738 of the Revised Statutes, as it contains fuller provisions on the same subject. Where a suit was brought by a citizen of Louisiana, in the circuit court of the United States for the district of Arkansas, to enforce a lien on lands situated within that district, and one of the defendants, a citizen of the state of Tennessee, was served with process in the state of Arkansas, it was held that such service gave the court jurisdiction of his person and of the subject matter; and that where it acquires such jurisdiction it will retain it for all purposes within the general scope of the equities sought to be enforced.[2]

§ 146. **Where all of the defendants cannot be served in other cases.**—In other cases where personal service cannot be made upon all of the defendants, section 737 of the Revised Statutes provides that the circuit court may take cognizance of suits and proceed to the trial and adjudication thereof between the parties who are properly before the court, in which case, however, the judgment or decree rendered therein will not prejudice other parties not regularly served with process or voluntarily appearing to answer. The non-joinder of parties who are not inhabitants of nor found within the district does not constitute matter of abatement or objection to the suit.[3] This

[1] 18 Stat. L., ch. 137, § 8.

[2] Ober *v.* Gallagher, 93 U. S. 199.

[3] The language of the provision is as follows:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other par-

section evidently remains unrepealed by the provisions of the act of March 3, 1875, as there is nothing therein contained providing for such a case; nor is it inconsistent with any provision of said act. Under its provisions a party residing out of the district and not served with process within it may voluntarily appear and become a party to the suit, when otherwise the court would have no jurisdiction over him.[1] So if there are several parties jointly and severally liable on a contract, as for instance in case of the endorsers of a bill of exchange, and the makers and endorsers of a joint and several promissory note, the court would have jurisdiction of those defendants properly served with process within the district, and could proceed to judgment against them, though the other parties reside without the district, and are not served within it and do not voluntarily appear.[2]

§ 147. **When a party may be omitted; when not.**—The court will make no decree in favor of a complainant where no relief can be given without taking an account between an absent party and one before the court, though the defect of parties for this purpose may not, strictly speaking, defeat jurisdiction. But if a prior incumbrancer is out of the jurisdiction of the court, or cannot be joined without defeating it, it has been held proper for the court to dispense with his presence and order a sale subject to his incumbrance, which would not be affected by such an order or decree.[3] If parties have a merely nominal interest in the suit or proceeding as defendants, and reside beyond the jurisdiction of the court, it should not dismiss a bill because they are not made parties, but proceed to a decree against the actual defendants.[4] But where the subject-matter of the action lies beyond the limits of the territorial jurisdiction of the court, and the process of the court cannot reach the *locus in quo*, the provisions of the act relating to non-resident parties do not apply.[5]

ties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district as aforesaid shall not constitute matter of abatement or objection to the suit."

[1] Taylor *v.* Cook, 2 McLean 516; Pond *v.* Vermont Valley R. R. Co., 12 Blatch. 282.

[2] Cooper *v.* Gordon, 4 McLean 6; Clearwater *v.* Meredith, 21 How. 489; Inbusch *v.* Farwell, 1 Black. 556.

[3] Hagan *v.* Walker, 14 How. 29; Louisville R. R. Co. *v.* Letson, 2 How. 497; Findlay *v.* Bank, 11 Wh. 304.

[4] Union Bk. *v.* Stafford, 12 How. 327.

[5] Northern Ind. R. R. Co. *v.* Mich. Central R. R. Co., 15 How. 233; s. c., 5 McLean 444.

Under a former act, similar to the section under consideration, it was

§ 148. **Formal parties may be dispensed with.**—Merely formal parties may, as we have observed, be dispensed with, and if they are made parties they may be dismissed if there can be a complete adjudication between other parties without them.[1] But if persons have such an interest in the subject-matter of the suit that a final decree cannot be made without prejudice to that interest and a defeat of their just and equitable rights, they must be made parties, and after being made parties they cannot be dismissed.[2] If, however, one defendant has a severable interest in the matter in controversy, and a decree may be rendered against the other defendants without prejudice to him, the suit may be dismissed as to him, and retained as to the others, where the court would have no jurisdiction over the former for want of proper citizenship.[3]

§ 149. **Suits on contract in favor of an assignee.**—Section 1 of the act of March 3, 1875, provides that neither the circuit nor district courts shall "have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in case of promissory notes negotiable by the law merchant and bills of exchange."

This provision was undoubtedly adopted to prevent assignments of contracts other than notes and bills of exchange merely for the purpose of conferring jurisdiction on the federal courts. If a suit, however, should be brought on such a contract in a state court, and it should appear that the real parties in interest were citizens of different states, it could perhaps be removed to a circuit court of the United States, and be there adjudicated, under the provisions of the second section of the same act, providing for the removal of

held that no decree in equity could be made in the absence of an indispensable party whose rights must necessarily be affected by the decree. Thus where a bill was filed in the circuit court to set aside an agreement executed by six individuals, four of whom resided in the state where the suit was brought and two in another state, it was held that the court could not rescind the contract as to the two and allow it to stand as to the four: Shields *v.* Barrow, 17 How. 130. See also Mallow *v.* Hinde, 12 Wh. 193; Cameron *v.* McRoberts, 3 Wh. 591; Russell *v.* Clark, 7 Cr. 69. And the objection to the decree in such a case may be taken at the time of the hearing or in the appellate court: Coiron *v.* Millaudon, 19 How. 113; Robertson *v.* Carson, 19 Wall. 94; Kendig *v.* Dean, 97 U. S. 423.

[1] Wormley *v.* Wormley, 8 Wh. 421; Carneal *v.* Banks, 10 Wh. 181; Vattier *v.* Hinde, 7 Pet. 252; Osborn *v.* Bank, 9 Wh. 738; Harding *v.* Handy, 11 Wh. 132.

[2] Barney *v.* Baltimore City, 6 Wall. 280; Shields *v.* Barrow, 17 How. 130.

[3] Horn *v.* Lockhart, 17 Wall. 570; Batesville Institute *v.* Kauffman, 18 Wall. 151.

causes. The provision referred to should have been incorporated into the section for the removal of causes, in order to secure the object of the provision in the first section.[1] The Judiciary Act of 1789 contained a provision somewhat similar to that act, providing that the circuit courts should not have "cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless the suit might have been prosecuted in such court to recover the contents if no assignment had been made, except in case of foreign bills of exchange."

This provision has been held to apply only to rights of action founded on contracts which contain within themselves some promise to be fulfilled or duty to be performed, and not to rights of action founded upon some wrongful act or neglect of duty to which the law attaches damages, even though based upon contract.[2] It has been held also that this provision does not apply to municipal bonds or attached coupons, where they are payable to bearer or endorsed to bearer, as they pass from one to another merely by delivery, and without the necessity of a formal assignment.[3] If a note is made payable to bearer he may maintain a suit on it in the circuit court if it is averred that he and the maker are residents of different states,[4] although under the former statute it was essential to aver that the maker was a citizen of the state where the suit was brought and the holder a resident of another state.[5] Where a suit was brought to recover damages for the failure of the defendants to take the proper steps to preserve the value of commercial paper, it was held, under the act of 1789, that the suit was not one for the purpose of recovering the contents of a promissory note or other chose in action, and therefore was not within the provisions of the statute limiting the jurisdiction of the court in suits on promissory notes or other choses in action.[6] Under the provisions of the Judiciary Act of 1789, the assignee of a chose in action could sue thereon in the circuit court where the requisite citizenship of the parties existed, and the

[1] Bushnell *v.* Kennedy, 9 Wall. 387.
[2] Bushnell *v.* Kennedy, 9 Wall. 387.
[3] City of Lexington *v.* Butler, 14 Wall. 282.
[4] The Pacific R. R. Co. *v.* Ketchum, 101 U. S. 298.
[5] Strawbridge *v.* Curtiss, 3 Cr. 267; Moffat *v.* Soley, 2 Paine 103. Under the act of 1789 it was held that where there was an assignment by will, the representative of the decedent need not aver the citizenship of the maker or of the original payee of a note. Chappdelcaine *v.* Dechenaux, 4 Cr. 306. See also Seckel *v.* Backhaus, 7 Biss. 354.
[6] Barney *v.* Globe Bk., 5 Blatch. 107. See also Deshler *v.* Dodge, 16 How. 622.

assignor might have done so if no assignment had been made, although the assignor at the time of the assignment was a citizen of the same state with the maker.[1] The same rule would be applicable under the provisions of section 1 of the act of 1875. Under the provisions of the latter act, a circuit court would have jurisdiction of a bill to foreclose a mortgage given to secure negotiable notes of the mortgagor, which notes and mortgage, by written assignment and delivery, came into the hands of the complainant, he being a non-resident of the state where the suit is brought, and the defendant a resident thereof, although the original payee and assignor could not by reason of his citizenship have brought the suit.[2]

Where a judgment was recovered by a citizen of New York against a citizen of Pennsylvania in the state court of the latter state, and the former assigned the judgment to a citizen of Pennsylvania, whose executors assigned it to an alien, it was held that the latter could maintain a bill in the circuit court to enforce the judgment, notwithstanding the intermediate assignment to a citizen of Pennsylvania.[3]

The assignee of a common chose in action must show affirmatively by his pleading, and, if controverted, by his proofs on the trial, that the obligee could have maintained the suit if no assignment had been made.[4]

It may be safely affirmed that in all cases of suits by assignees upon contracts other than negotiable promissory notes or bills of exchange, it is sufficient to give the proper circuit court jurisdiction, so far as the parties are concerned, that they are citizens of different states and that the original assignor could have maintained an action thereon in the circuit court if no assignment had been made at the time of the commencement of the suit by the assignee. If the payee resided in the same state as the maker of a non-negotiable note at the time of its execution, but afterwards removed to another state, he could of course maintain an action in the proper circuit court if the amount involved was sufficient. So the assignee of such a party could, under like circumstances of citizenship, maintain an action

[1] White *v.* Leahy, 3 Dill. 378.

[2] Seckel *v.* Backhaus, 7 Biss. 354.

[3] Wilson *v.* Fisher's Executors, 1 Bald. 133 (1830). See also Irvine *v.* Lowry, 14 Pet. 293 (1840). Where the suit is on a non-negotiable promissory note by a non-resident assignee, and against the maker and the payee and indorser, who are residents of the state where the suit is brought, the circuit court would have no jurisdiction: Shufford *v.* Cain, 1 Abb. 302. Keary *v.* Farmers' Bank, 16 Pet. 89.

[4] Bradley *v.* Rhines, 8 Wall. 393; Coal Co. *v.* Blatchford, 11 Wall. 172.

thereon, if at the time of the commencement thereof the payee could have maintained it, and it would not affect this right if the payee or assignor should afterwards become a resident of the same state as the maker.[1]

§ 150. **Suits by indorsees.**—It is evident that, under the existing statutes, an indorsee, being a citizen of a different state from that of an indorser, whether of a promissory note negotiable by the law merchant or a bill of exchange, could, so far as citizenship is concerned, maintain an action against the indorser, whether a suit could be maintained by the assignee or the payee against the maker or not.[2]

§ 151. **Corporations citizens; bonds and coupons not promissory notes or bills of exchange.**—A corporation is a citizen of the state where it is created, in the sense of the statute requiring the proper citizenship of parties to confer jurisdiction upon the federal courts, it being conclusively presumed that the individual members of it are citizens of such state.[3] This doctrine is applicable to both private and municipal corporations. Where bonds were executed by a municipal corporation, with coupons attached, to a railroad corporation, and both corporations were created by and located in the same state, and the bonds and coupons were transferred to the bearer in blank, it was held that the latter could not sue for the recovery of their contents in the circuit court, as such instruments are not promissory notes negotiable by the law merchant, nor bills of exchange, and the payee or original holder could not maintain a suit thereon in said court for the want of jurisdiction to take cognizance of such suits.[4] But in such a case the action could be

[1] Chamberlain *v.* Eckert, 2 Biss. 126; Thaxter *v.* Hatch, 6 McLean 68 (1869); Kirkman *v.* Hamilton, 6 Pet. 20. A general assignee under the insolvent laws of a state is an assignee within the meaning of the statute, and he cannot sue if his assignor could not: Bradford *v.* Jenks, 2 McLean 130; Sere *v.* Pitot, 6 Cr. 332.

[2] Young *v.* Bryan, 6 Wh. 146; Evans *v.* Gee, 11 Pet. 80; Coffee *v.* Planters' Bank, 13 How. 183; Mollan *v.* Torrance, 9 Wh. 537.

[3] Louisville R. Co. *v.* Letson, 2 How. 497 (1844); Marshal *v.* Baltimore, etc., R. Co., 16 Id. 314; Covington, etc., Co. *v.* Shepherd, 20 Id. 227; Railroad Co. *v.* Harris, 12 Wall. 65; Railroad Co. *v.* Whitton, 13 Id. 270. It was formerly held that a corporation was not, in the sense of these statutes, a citizen, and that in order to confer jurisdiction in such cases it was necessary to aver and prove that all the members of it had the requisite citizenship: Bank of U. S. *v.* Deveaux, 5 Cr. 84 (1809); Commercial Bank *v.* Slocomb, 14 Pet. 60 (1840); Ward *v.* Arredondo, 1 Paine 410.

[4] Clark *v.* City of Janesville, 1 Biss. (C. C.) 98. See also Sheldon *v.* Sill, 8 How. 441; Deshler *v.* Dodge, 16 Id. 622; Gibson *v.* Chew, 16 Pet. 315; Dromgoole *v.* Farmers' and Merchants'

commenced in a state court, and if the value of the amount in controversy exceeded five hundred dollars it might be removed to the proper circuit court, as it would be between citizens of different states. This would appear to be sufficient cause of removal, without regard to the right of the payee or original holder to maintain an action thereon in the circuit court, if the contract had not been assigned; and it would appear that the circuit court would, upon the removal, acquire jurisdiction of the suit.

§ 152. **Where a corporate bond is payable to bearer.**—If a corporate bond is made payable to bearer, and is transferred by mere delivery, and not by a written endorsement or assignment, the holder is not an assignee within the meaning of the statute; and he may bring suit thereon in the circuit court if the amount is sufficient and there is the requisite citizenship of the parties.[1] The right to bring suit in such cases in the state where the plaintiff resides, if personal service can be made on the non-resident defendant therein, is authorized by the provisions of the first section of the act of March 3, 1875.

§ 153. **Facts showing jurisdiction must be averred.**—The circuit courts of the United States have no powers except those conferred by acts of Congress. There are no presumptions in favor of their jurisdiction, and where their judicial action is invoked, the facts upon which their jurisdiction rests must in some form appear in the record. This doctrine is applicable to both civil and criminal cases.[2] They have no common law jurisdiction of criminal cases, it being limited to that conferred by acts of Congress, and they can try no offences except such as are made so by said acts.[3]

As the federal courts have a special and not a general jurisdiction, and there can be no presumption of jurisdiction, it is necessary to make a special allegation of the facts required to give the court

Bank, 2 How. 241; Thomson *v.* Lee County, 3 Wall. 327. A different rule prevails where no assignment has been made: City of Lexington *v.* Butler, 14 Wall. 283.

[1] White *v.* Railroad, 21 How. 275; Mercer Co. *v.* Hacket, 1 Wall. 830. See also Bonnafee *v.* Williams, 3 How. 574; White *v.* Vermont and Mass. R. Co., 2 How. 575; Halstead *v.* Lyon, 2 McLean 226; Sackett *v.* Davis, 3 McLean 101 (1842).

[2] United States *v.* Eckford, 6 Wall. 484; United States *v.* Bevans, 3 Wh. 336; United States *v.* Hudson, 7 Cr. 32; United States *v.* Clark, 8 Pet. 444; Briscoe *v.* Bank, 11 Cr. 321; United States *v.* Donlan, 5 Blatch. 294; Bank of the United States *v.* Deveaux, 5 Cr. 61; Seldon *v.* Sill, 8 How. 441; Harrison *v.* Hadley, 2 Dill. 229; Hubbard *v.* Northern R. Co., 3 Blatch. 84.

[3] United States *v.* Barney, 5 Blatch. 294.

jurisdiction in each particular case. Thus, where the jurisdiction depends upon the proper citizenship of the parties, as that they are citizens of different states, that fact should be distinctly averred, and the particular states of which they are citizens should also be alleged;[1] although it is not always necessary to show, under the act of 1875, that one of them is a citizen of the state where the suit is brought.

In case a partnership is a party, it would be sufficient to aver that it is a firm, the members of which are citizens of a different state from that of the other party to the suit. But where there was an averment that the plaintiffs were a firm organized to carry on a banking business at Omaha, Nebraska territory, and had been for eighteen months in said business at that place, it was held that this was a sufficient averment of citizenship.[2]

As a general rule, however, it is safer to aver the facts constituting the proper citizenship of the parties in a positive and distinct manner, and not leave it to be inferred argumentatively from the averments of the declaration or bill.[3]

It has also been held that citizenship and residence are not synonymous but distinct terms.[4] An omission to aver sufficiently the proper citizenship of the parties is, however, amendable;[5] and if the defendant makes no objection to the want of a proper averment of it, and proceeds to trial, the Supreme Court will, on writ of error, grant leave to amend the pleadings in this respect.[6]

In the case of a corporation, its citizenship should be averred to be of the state where it was created, and it would not be necessary to allege, as we have observed, that the members composing it were residents of such state.[7]

[1] Hornthall *v.* The Collector, 9 Wall. 560; Mason *v.* Rollins, 13 Wall. 602; Christmas *v.* Russell, 5 Wall. 290; Bingham *v.* Cabot, 3 Dall. 382; Turner *v.* Bank of America, 4 Dall. 8; Gassees *v.* Ballou, 6 Pet. 761; McDonald *v.* Smalley, 1 Pet. 623; Jackson *v.* Twentyman, 2 Pet. 136; Eberly *v.* Moore, 24 How. 157; Shelton *v.* Tiffin, 6 How. 163; Shepherd *v.* Graves, 14 How. 393; Wickliffe *v.* Owings, 17 How. 47; Dred Scott *v.* Sanford, 19 How. 395. In the latter case the Supreme Court decided that as it appeared from the record that the plaintiff's ancestors were imported from Africa and sold as slaves, the plaintiff could not be a citizen of a state, and was not entitled to sue in that character in a circuit court of the United States.

[2] Express Co. *v.* Kountz Brothers, 8 Wall. 342.

[3] Brown *v.* Keene, 8 Pet. 115.

[4] Parker *v.* Overman, 18 How. 137; Railway *v.* Ramsey, 22 Wall. 322.

[5] Kelsey *v.* Pennsylvania R. Co., 14 Blatch. 89.

[6] Robertson *v.* Cease, 97 U. S. 646.

[7] See *ante*, § 151.

An averment in a declaration that the defendant was a corporation created by an act of the legislature of the state of New York, but located and doing business in Aberdeen, in the state of Mississippi, under the laws of that state, was held to be insufficient as an averment that the corporation was a citizen of Mississippi, where the suit was brought, but was in legal effect an averment that the defendant was a citizen of the state of New York.[1]

§ 154. **Implied and resulting powers.**—While the federal courts have a limited and restricted jurisdiction, the mode of practice and procedure may conform to the rules of the common law or chancery practice; and they have certain implied powers necessarily resulting from their institution. Thus they have power to punish for contempt and contumacy, and to enforce the observance of order, as these are necessary to the exercise of those powers expressly conferred.[2]

§ 155. **A statute covering the subject of a former one is substituted therefor.**—We have already alluded to the construction of statutes where two or more refer to the same subjects. In such a case, if the objects are not the same, they may all be valid and stand. But if the whole subject of former statutes is covered by a subsequent one, and the mode of practice or procedure is varied by the latter, it operates by way of substitution, and repeals all the former ones on the same subjects.[3] This doctrine would seem to be applicable in the construction of the first and second sections of the act of 1875, relating to the jurisdiction of the circuit courts and the removal of causes thereto from the state courts. The provisions of the Revised Statutes conferring original jurisdiction upon the circuit courts and providing for the removal of causes there from state courts would appear to be repealed by implication by the act of 1875.

[1] Insurance Company *v.* Francis, 11 Wall. 210. See also Covington, etc., Co. *v.* Shepherd, 20 How. 227; Manufacturing Co. *v.* Brack, 8 Blatch. 137.

As to the case of joint stock companies not fully possessed of corporate powers, see Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566; Pennsylvania *v.* Quicksilver, etc., Co., 10 Wall. 553; Waltz *v.* Am. Ex. Co., 3 Cent. Law Jour. 157.

[2] United States *v.* Hudson, 7 Cr. 52; United States *v.* Coolidge, 1 Wh. 415; 1 Gallison 488; United States *v.* Bevans, 3 Wh. 336.

[3] United States *v.* Claflin, 97 U. S. 546. So where the jurisdiction of a suit depends upon a statute, a repeal of the statute during the pendency of it takes away the jurisdiction: Insurance Co. *v.* Ritchie, 5 Wall. 541; Philadelphia *v.* The Collector, 5 Wall. 720; Hornthall *v.* The Collector, 9 Wall. 561; The Assessors *v.* Osborne, 9 Wall. 567.

§ 156. **Suits under import, revenue and postal laws, and for the enforcement of penalties and the condemnation of property.**—The act of 1875, like the previous statutes, provides for the jurisdiction of the circuit courts in all suits of a civil nature where the amount or value in controversy exceeds five hundred dollars, and arising under the laws of the United States. This includes all suits arising under any act of Congress, "providing for revenue from imports or tonnage," and "all causes arising under any law providing internal revenue," and "all causes arising under the postal laws."[1] Cognizance may be taken by the circuit courts of such cases, without regard to the citizenship or character of the parties, as well as of suits under statutes for the enforcement of penalties,[2] and the condemnation of property taken as prize if used for insurrectionary purposes.[3] Under the provisions of the act of August 6, 1861, relating to prizes, of which our present statute is a substantial copy, the questions presented to the Supreme Court were whether the circuit courts had jurisdiction of such prizes taken on land; what the proper practice and procedure in such a case should be; and whether the statute covered both personal and real property. It was held that the act covered all descriptions of property, both real and personal, on land or on water; that the circuit court had jurisdiction under the statute of proceedings to condemn property on land, including real estate; and that the procedure in such cases might be in general conformity with the practice in admiralty, but not to the extent of preventing parties from having a jury to try issues of fact, in this respect differing from the strict course of admiralty practice.[4]

§ 157. **Suits for the enforcement of liens or the removal of incumbrances.**—Provision is made by the eighth section of the act of March 3, 1875, for suits to enforce liens upon or claims to, "or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought," where one or more of the defendants is not an inhabitant of the district, nor found therein, and shall not voluntarily appear thereto. This provision gives a more extended and complete remedy to the plaintiff in these particular cases.[5]

[1] Rev. Stat. § 629, sub. 4.
[2] Rev. Stat. § 629, sub. 5.
[3] Id. sub. 6; Rev. Stat. §§ 5308, 5309.
[4] Union Ins. Co. *v.* U. S., 6 Wall. 759. See also The Sarah, 8 Wh. 394; The Vengeance, 3 Dall. As to effect a pardon in such a case, see Armstrong's Foundry, 6 Wall. 766; *Ex parte* Garland, 4 Wall. 380; Morris' Cotton, 8 Wall. 507.
[5] See *ante*, § 145.

The first section of this act, among other things, provides: "No civil suit shall be brought before either of said courts [circuit or district] against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings, except as hereinafter provided." And section 10 provides: "That all acts and parts of acts in conflict with the provisions of this act are hereby repealed." Now it is evident that this act repeals section 737 of the Revised. Statutes, and limits the cognizance of these courts to suits where the defendant is an inhabitant of the district where the suit is brought, or in which he shall be found at the time of serving the process or commencing the proceedings, except as provided by the eighth section of said act.

§ 158. **Suits for seizure under the slave-trade laws.**—The circuit courts have jurisdiction of all suits arising under the laws relating to the slave-trade. This jurisdiction was conferred by an act of Congress as early as 1794.[1] The cognizance of such cases is vested exclusively in the federal courts, and the state courts could not exercise jurisdiction therein.[2] Under the original statute on this subject, it was held that the court of the district where the original seizure was made, or where the property was first carried and proceeded against if it was seized upon the high seas, had jurisdiction of the case.[3] And under the act of 1794, which provided for the seizure of a vessel, in case of preparing to sail, or causing her to sail, for the purpose of embarking in the slave-trade, it was held that it was not necessary that the vessel should be completely fitted out and ready for sailing before the right of seizure attached, but that it was sufficient if the preparations had proceeded so far as to manifest an intention to sail in violation of the statute.[4]

§ 159. **Suits arising under the patent and copyright laws.**—All suits arising under the patent or copyright laws of the United States must necessarily be originally instituted in the circuit courts. Their jurisdiction is exclusive,[5] and state courts can take

[1] Act of March 22, 1794, c. 11, § 1, v. 1, p. 347.

[2] Dred Scott *v.* Sanford, 19 How. 393. See also U. S. Const., art. 1, § 9; act of March 3, 1819; May 10, 1800; and January 1, 1808.

[3] The Merino, 9 Wh. 391. See also Rev. Stat. § 730; U. S. *v.* Jackalow, 1 Black. 484.

[4] The Emily, 9 Wh. 381 (1824). See also The Wanderer, Sprague 515; The San Jago, 9 Wh. 409.

[5] Rev. Stat. § 711, sub. 5.

no cognizance of such cases. The subject-matter confers the jurisdiction upon the federal courts in such cases, and the citizenship of the parties is quite immaterial; but it would be necessary to make service of original process in the district where the suit is brought.[1]

If, however, the controversy does not arise out of patent or copyright laws, or depend upon a construction of them, but on a contract of assignment of a patent or copyright, or an interest in it, the circuit courts would have no exclusive cognizance of it;[2] and their jurisdiction in such a case would depend entirely upon the proper citizenship of the parties. Thus, when a suit was brought by a patentee in a circuit court on a contract governing the rights of the parties to the use of a patented invention, and the defendant admitted the validity of the patent and his use of the same, the Supreme Court held that the circuit court had no jurisdiction of the suit, on the ground of the subject-matter of it, and as the suit was between citizens of the same state the circuit court had no right to take cognizance of the case.[3] So, where a bill was filed for the specific performance of a contract for the transfer of an interest in a patent-right, it was held this was not alone sufficient to give the court jurisdiction.[4]

This doctrine would of course apply to contracts relating to the use of a copyright. Thus, where an author made a contract with certain publishers by which he gave them the exclusive right to print a manuscript and publish and sell the same, for which the latter was to pay the author a fixed sum for each copy of the work sold, and with the assent of the author the publishers secured the copyright to the same in their own names; and afterwards the author revised the work, and secured the copyright of the revised edition in his own name, and sought to restrain the publishers from further sales of the work by an injunction from the circuit court, it was held that the subject-matter did not give the circuit court jurisdiction, as the suit was not based upon the copyright laws of the United States, but upon a contract made between the parties.[5]

[1] Act of 1875, § 1; Allen *v.* Blunt, 1 Blatch. 480; Ogle *v.* Ege, 4 Wash. 584.

[2] Wilson *v.* Sanford, 10 How. 99; Hartshorne *v.* Day, 19 How. 211; Goodyear *v.* The Union Rubber Co., 4 Blatch. 63; Goodyear *v.* Day, 1 Blatch. 565.

[3] Hartzel *v.* Tilghman, 99 U. S. 547.

[4] Burr *v.* Gregory, 2 Paine 426 (1827).

[5] Pulte *v.* Derby, 5 McLean 328 (1852). See also Boucicault *v.* Hart, 13 Blatch. 47. See also Boucicault *v.* Fox, 5 Blatch. 97; Bartlett

In case, however, the whole interest in a patent, or the right in certain territory of the United States, is duly assigned and recorded under the provisions of the patent laws, the assignee may sue for infringement of the same, and a circuit court could entertain jurisdiction of the same on the ground of the subject-matter without regard to the citizenship of the parties,[1] and restrain by injunction such infringements.[2]

But if a claim for damages is made, and an injunction is asked to restrain an alleged infringement of a patent-right or copyright, whether by the patentee or author or by his assignee, and the defendant denies the originality of the invention or authorship, or affirms that the patent was made broader than the invention of the patentee, the controversy would be one arising under the patent or copyright laws of the United States, and the subject-matter would give the circuit courts jurisdiction.[3]

It may be observed that the circuit courts always exercise their discriminating power in granting or refusing injunctions to restrain the sale or use of inventions, before a judgment has at law been had sustaining the patent thereto, and in all such cases the infringement should be made clear and palpable before an injunction is allowed.[4]

It may be proper here to observe that Congress has the exclusive power to legislate on the subject of patents, and a state cannot impose any restrictions upon the right of a patentee to sell his invention.[5]

§ 160. **Suits by and against national banks.**—Associations for the purpose of carrying on banking business under the statutes relating thereto may sue and be sued in the circuit courts of the United States. But their jurisdiction is not exclusive, as it is expressly provided by the fifth subdivision of section 5136 of the Revised Statutes that when such associations are duly organized

v. Crittenden, 4 McLean 300; and Fulsom *v.* Marsh, 2 Story 113, as to authority of circuit courts to restrain by injunction unauthorized publications where they have jurisdiction.

[1] Littlefield *v.* Perry, 21 Wall. 205.

[2] Brown *v.* Shannon, 20 How. 56; Day *v.* Hayward, 20 How. 208.

[3] Potter *v.* Muler, 2 Fisher Pat. Cases 465; Potter *v.* Wilson, 2 Fisher Pat. Cases 102; Goodyear *v.* Providence Rubber Co., 2 Fisher Pat. Cases 499; Burr *v.* Durgee, 1 Wall. 531; O'Riley *v.* Morse, 15 How. 112; Battin *v.* Taggart, 17 How. 74.

[4] Cochrane *v.* Duner, 94 U. S. 780; Burleigh Rock Drill Co. *v.* Lobdell, 1 Holmes 450; Guttapercha Co. *v.* Goodyear Co., 3 Saw. 542.

[5] McClurg *v.* Kingsland, 1 How. 206; Blanchard *v.* Sprague, 3 Sum. 279; Payne *v.* Hook, 7 Wall. 425.

under the provisions of the statutes they may "sue and be sued, complain and defend, in any court of law and equity as fully as natural persons." They may therefore sue or be sued in any state, county or municipal court, in the county or city where they are located, having jurisdiction of similar cases between natural persons, unless there is some special provision of statute to the contrary.[1] But a national bank cannot be sued in a federal court outside the district where it is located.[2] Corporations are residents of the state and district where they are located and established.[3]

§ 161. **Suits by receivers of national banks.**—Before a receiver of a national bank can be appointed under the National Banking Act, on the ground of the failure of the bank to pay its notes, it requires certain action on the part of the Comptroller of the Currency;[4] and in any action by a receiver against the stockholders of a bank to enforce their personal liability as provided by the statute, it is necessary that he aver in his bill this preliminary action on the part of the Comptroller; but a receiver can sue as such in the circuit courts without regard to his citizenship;[5] and he may sue for demands due the bank, either in his own name or in the name of the bank, without any order of the Comptroller of the Currency so to do. But it has been held that a state court has no jurisdiction of a suit by a creditor against a receiver of a national bank, duly appointed after the insolvency of a bank, to recover a debt alleged to be due from the bank to him, and that the circuit courts of the United States have exclusive jurisdiction of such cases.[6] The power of the Comptroller of the Currency to proceed in the circuit

[1] Bank of Bethel *v.* Pahquioque, 14 Wall. 383; Pittilon *v.* Noble, 7 Biss. 450. They may sue in the federal courts and enjoin the collection of state and county taxes levied upon its capital: First Nat. Bank of Omaha *v.* County of Douglas, 3 Dill. 298; City Nat. Bank *v.* Paducah, 3 Cent. L. J. 347.

[2] Main *v.* Second Nat. Bank of Chicago, 6 Biss. 26. But in other cases, at least under the act of March 3, 1875, it is no longer necessary that one of the parties should be a citizen of the state where the suit is brought: Osgood *v.* Chicago, etc., R. Co., 6 Biss. 330; Pacific R. Co. *v.* Ketchum, 101 U. S. 298.

[3] Day *v.* Newark Ind. Rub. Man. Co., 1 Blatch. 628; Pomroy *v.* N. Y. & N. H. R. Co., 4 Blatch. 120. See *ante*, § 151.

[4] Rev. Stat. §§ 5226, 5227.

[5] Kennedy *v.* Gibson, 8 Wall. 498.

[6] National Bank *v.* Colby, 21 Wall. 609. But where the bill presented a question of property between the plaintiff and receiver, and they resided in the same state, the circuit court held it had no jurisdiction: Van Antwerp *v.* Hulbard, 8 Blatch. 282. See also Cadle *v.* Tracy, 11 Blatch. 101; *In re* Manufacturers' Bank, 5 Biss. 499; Irons *v.* Manufacturers' Bank, 6 Biss. 301.

court to wind up a national bank in certain contingencies, and to appoint a receiver therefor, does not, however, exclude the authority of other competent tribunals to appoint a receiver in other cases.[1] But the circuit court has no jurisdiction of a suit by a private person to control, restrain or interfere with the official action of the Treasurer or Comptroller of the Currency in respect to bonds deposited to secure the redemption of the circulating notes of banks.[2] It may, however, take cognizance of a suit by a stockholder to enjoin the officers of a national bank from any application of its funds not authorized by its charter, or which would amount to a breach of trust if there is the requisite citizenship of the parties.[3]

§ 162. **Suits to redress the deprivation of rights.**—Under the act of 1875 the circuit courts would have cognizance of all suits instituted "by any persons to redress the deprivation under color of any law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity secured by the Constitution of the United States, or by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States,"[4] as such suits would be those arising under the Constitution or laws of the United States.[5] The powers of the federal courts under this provision have mainly been invoked to redress the wrongs of colored persons, whose equal rights were undoubtedly intended to be secured by the statutory provisions referred to in the notes.[6]

§ 163. **Appellate jurisdiction of the circuit courts.**—The statute provides for an appellate jurisdiction of the circuit courts: "From all final decrees of a district court in causes of equity or of admiralty jurisdiction, except prize causes, where the matter in dispute exceeds the sum or value of fifty dollars exclusive of costs, an appeal shall be allowed to the circuit court next to be held in such district, and such circuit court is required to receive, hear and determine such appeal."[7]

[1] Irons *v.* Manufacturers' Bank, 6 Biss. 301.

[2] Van Antwerp *v.* Hulbard, 7 Blatch. 426; s. c., 8 Blatch. 282.

[3] Shoemaker *v.* The Mechanics' Nat. Bank, 2 Abb. (U. S.) 416; Dodge *v.* Woolsey, 18 How. 341.

[4] Rev. Stat. § 629, sub. 16.

[5] Rev. Stat. §§ 858, 1977, 1979.

[6] Act of May 31, 1870, and March 1, 1875.

[7] Rev. Stat. § 637.

§ 164. **The decree must be a final one.**—The decree of the district court must be a final one or the circuit court cannot act upon it, as it would have no jurisdiction; and it should appear in the record brought up on appeal that the decree was final. Even the consent of counsel to the insertion of a final decree, and an amendment of the record to that effect, will not suffice to give the circuit court jurisdiction in such cases.[1] Where a district court sitting in admiralty adjudged that a sum of money was due, but the amount could not be determined, as it depended upon other claims that might be established, and no order could be made for the payment of money from the fund in court until it should be further advised, this was held not to be a final decree that would confer appellate jurisdiction on the circuit court.[2]

§ 165. **It must be a cause of equity or of admiralty or maritime jurisdiction; when an appeal will be dismissed.**—To authorize an appeal the cause must be of equity or of admiralty jurisdiction, except it be a prize cause. If the cause belongs to the law side of the court it can only be reviewed by a writ of error. Thus, where property was seized on land and libelled as forfeited to the United States for a violation of the revenue laws, it was held that the cause belonged to the law side of the court, and that the circuit court, to which it was appealed, could not entertain jurisdiction.[3]

The appeal must be taken to the next term of the circuit court to be held in the district after the rendering of the decree by the district court. If not so taken, it will be dismissed.[4]

§ 166. **Jurisdiction on error to judgments of district courts.**—The circuit courts have also jurisdiction of civil actions to re-examine the judgments of the district courts on writs of error. In such a case the judgment of the district court must be a final one; the matter in dispute must exceed the sum or value of fifty dollars exclusive of costs; and it can only be reviewed by a circuit court holden in the same district. The judgment below may be either reversed or affirmed by the circuit court;[5] or it may modify the judgment, decree or order, or direct such judgment, decree or order

[1] Mordecai *v.* Lindsay, 19 How. 199.

[2] Montgomery *v.* Anderson, 21 How. 386.

[3] United States *v.* Thirty-seven Barrels of Rum, 1 Woods 19; United States *v.* Haynes, 2 McLean 155; United States *v.* Wonson, 1 Gallis. 5.

[4] U. S. *v.* $5100 in Specie, 1 Woods 14.

[5] Rev. Stat. § 633. The circuit court for the three districts of Alabama can exercise appellate and revisory jurisdiction of the decrees and judgments of the district courts of said districts: Id. § 634.

to be rendered, or such further proceedings had by the district court, as the justice of the case may require.[1] But the statute provides that "no judgment, decree or order of the district court shall be reviewed in a circuit court on writ of error or appeal, unless the writ of error is sued out or the appeal taken within one year after the entry of such judgment, decree or order," except where the party entitled thereto is an infant, or *non compos mentis*, or imprisoned, in which case the appeal may be taken or the writ of error prosecuted within one year after the removal of the disability.[2] Under a similar exception limiting the time of bringing a writ of error or the taking of an appeal for review in the Supreme Court, of a judgment, decree or order of a circuit or district court in a civil action,[3] it has been held that the statute did not run, during the war of the rebellion, against a non-resident of a rebellious state in favor of a resident.[4]

§ 167. **Jurisdiction in cases transferred from the district courts on account of the disability of the judge.**—The statute also provides for the removal of causes from the district to the circuit courts, where the district judge is disabled, or interested in the suit, or has been of counsel for either party, or is related to either party.[5] In such cases the circuit court may take cognizance of the cause if properly certified to it, whether civil or criminal, or of whatever nature, in the same manner as it might have done if the same had originally and lawfully commenced therein.[6]

§ 168. **Always open for certain purposes.**—It may be well to observe, in this connection, that the circuit courts, as courts of equity, are always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to a hearing upon their merits; and any judge of the court may, upon reasonable notice to the parties, at chambers or at the clerk's office, and in vacation as well as in term time, make, direct and award all such process, commissions, orders, rules and other proceedings, whenever they are not grantable of course, according to the rules and practice of the court.[7]

[1] Rev. Stat. §§ 634, 636.
[2] Rev. Stat. § 635; Sedgwick *v.* Fridenburgh, 11 Blatch. 77.
[3] Rev. Stat. § 1008.
[4] The Protector, 9 Wall. 687; Hanger *v.* Abbott, 6 Id. 532.
[5] Rev. Stat. §§ 587, 588.
[6] Rev. Stat. § 637. See also §§ 587, 601.
[7] Rev. Stat. § 638.

§ 169. **Causes for removal of suits from state courts jurisdiction.**— By the provisions of various acts of Congress adopted since the Judiciary Act of 1789 the jurisdiction of the circuit courts has been enlarged and their business has been thereby greatly increased. This is largely owing to the liberal provisions therein made for the removal of causes from the state courts. The act of March 3, 1875, provides: "That any suit of a civil nature at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the circuit court of the United States for the proper district; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the circuit court of the United States for the proper district."[1]

This phraseology is similar to the first section of said act, and follows the language of the Constitution on the same subject.[2] If, therefore, a circuit court may take original cognizance of suits for any of the causes mentioned in the first section of the act, for the same causes may suits be removed from a state court to the proper circuit court, where the suits are originally commenced in a state court. In fact, as we have noticed, there would appear to be authority to take cognizance of certain suits on removal, that could not originally be brought in the circuit courts, as in case of a suit founded upon contract, other than a promissory note negotiable by the law merchant or bill of exchange, brought by an assignee of the same. In such a case the circuit court could have no cognizance of the suit unless it could have been brought in that court to recover thereon if no assignment had been made. But a suit on such a contract may be brought in a state court, and on a proper application, and

[1] Act March 3, 1875, ch. 137, § 2; 18 Stat. L. 471.

[2] Removal Cases, 100 U. S. 457.

for any of the causes mentioned in section 2 of the act, which makes no exception of suits founded on common contract, it could perhaps be properly removed to the proper circuit court.[1]

As the conditions and causes for removal are similar to those giving original jurisdiction to the circuit courts in civil cases, it is manifest that decisions construing the statute and determining its application in one class of cases would be equally applicable to the other.

§ 170. **Two classes of causes for removal.**—It will be observed that there are two classes of causes authorizing a removal. In one class of cases mentioned in the statute, a removal may be had without regard to the citizenship of parties, as where a suit of a civil nature at law or in equity arises "under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner." In this class of cases the citizenship of the parties is not involved. In the other class of cases the right of removal depends upon the proper citizenship of the parties. In all cases the suit must be one of a civil nature at law or in equity, and the matter in dispute must exceed the sum or value of five hundred dollars exclusive of costs; and in the class of cases last mentioned it must be—1. A controversy between citizens of different states; or, 2. A controversy between citizens of the same state claiming lands under grants of different states; or, 3. A controversy between citizens of a state and foreign states, citizens or subjects.

§ 171. **All suits of a civil nature.**—It must be a controversy of a civil nature, at law or in equity, which can be removed. This embraces all suits on contracts as well as for torts,[2] and all kinds of actions cognizable in courts of equity.[3] It covers a suit in a state

[1] It may be observed, however, that the first section of the act provides that no "circuit or district court shall have cognizance of any suit founded on contract in favor of an assignee, unless such suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." In the absence of a construction of this language, it may perhaps be unsafe to assume that it will not be construed to extend to suits removed to, as well as those originally brought in, the circuit courts.

[2] Vannevar *v.* Bryant, 21 Wall. 41; Fouvergne *v.* New Orleans, 18 How. 470; *In re* Turner, 3 Wall. Jr. 260; Beecher *v.* Gillett, 1 Dill. 308; Allin *v.* Robinson, Id. 119; Dennistoun *v.* Draper, 5 Blatch. 336; Gibbs *v.* Usher, 1 Holmes 348.

[3] Charter Oak Co. *v.* Star Insurance Co., 6 Blatch. 208; Gaines *v.* Fuentes, 92 U. S. 10; Parker *v.* Overman, 18 How. 137.

court to restrain or stay the execution of a judgment of a state court;[1] and suits not regularly brought in a state court, such as suits pending in a state court, but brought there under the provisions of the statute of a state, from an appraisement of lands by commissioners duly appointed for that purpose, which is sought to be appropriated by a corporation under the right of eminent domain.[1]

For forms in cases of removal, see *post* ("Forms for Removal of Causes"), No. 175, *et seq.*

§ 172. **Suits arising under the Constitution or laws or treaties of the United States.**—Under the second clause of the section above referred to, the cause of removal depends upon the suit "arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority."

The petition in such a case should show, by the facts and circumstances stated therein, that some disputed question of construction of the Constitution or laws of the United States, or some treaty made under their authority, is involved in the suit; and it is not sufficient that the petitioner states merely his opinion or conclusion that the suit arises under the Constitution or laws of the United States, or a treaty made by their authority.[2] And if the suit is to determine the rights of claimants to mines, and the only questions presented relate to the local laws, rules, regulations and customs by which the rights of the parties are governed, and whether the parties have observed them, this is not a ground for jurisdiction or removal.[3]

If a judgment in a suit depends upon a proper construction of the Constitution or laws of the United States, the suit may be removed;[4] but the Constitution will not be construed so as to authorize the federal courts to correct mere abuses of power committed by a state government.[5] The following case is one where original jurisdiction was entertained on the ground of a constitutional question being pre-

[1] West *v.* Auroria, 6 Wall. 139; Patterson *v.* Boone Co., 3 Dill. 465.

[2] Gold W. and W. Co. *v.* Keyes, 96 U. S. 199; Wilder *v.* Union National Bank, 12 C. L. N. 75.

[3] Trafton *v.* Nougues, 4 Saw. (C. C.) 178; The 420 Mining Co. *v.* The Bullion Mining Co., 3 Saw. 634; Dowell *v.* Griswold, 5 Saw. 39; Bertonneau *v.* Directors, 3 Woods (C. C.) 177; Barrow *v.* Hunton, 99 U. S. 80.

[4] Cohens *v.* Virginia, 6 Wh. 264; Osborne *v.* Bank, 9 Wh. 821; United States *v.* Peters, 5 Cr. 115; Ableman *v.* Booth, 21 How. 506; Thurston *v.* Union Pacific R. Co., 3 Dill. 366.

[5] St. Louis *v.* The Ferry Co., 11 Wall. 423; State Tax on Foreign-held Bonds, 15 Wall. 300.

sented, but the facts of the case would also authorize a removal from a state court to the proper circuit court, and confer jurisdiction upon the latter.

A suit was instituted in the state of Connecticut to restrain the collection of taxes levied on the real estate of the plaintiff, for the satisfaction of taxes assessed against him by reason of his ownership of certain bonds, executed and made payable in the state of Illinois and secured by a trust deed upon real estate therein situated, the statute of the state of Connecticut providing for such assessment and levy in that state. The question presented in the circuit court where the suit was brought was whether the statute authorizing such assessment and levy in Connecticut was repugnant to the Constitution of the United States. The case was taken by writ of error to the Supreme Court, which held that the statute of Connecticut authorizing such levy was not repugnant to the Constitution of the United States. The court say: "So long as the state by its laws prescribing the mode and subjects of taxation does not trench upon the legitimate authority of the Union, or violate any right recognized or secured by the Constitution of the United States, this court, as between the state and its citizens, can afford him no relief against state taxation, however unjust or oppressive or erroneous."[1]

§ 173. **Either party may remove when the controversy is between citizens of different states.**—It will be observed that the section under consideration provides for a removal by either party, where a case of removal exists; and that where the "controversy is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the circuit court of the United States for the proper district."

The Supreme Court of the United States, in construing the provision allowing a removal by either party of suits in which there shall be a controversy between citizens of different states, say: "This we understand to mean that where the controversy about which a suit in the state court is brought is between citizens of one or more states on one side and citizens of other states on the other

[1] Kirtland *v.* Hotchkiss, 100 U. S. 491. See also Providence Bank *v.* Billings, 4 Pet. 563.

side, either party to the controversy may remove the suit to the circuit court, without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purpose of removal the matter in dispute may be ascertained, and the parties to the suit ranged on the opposite sides of the dispute. If in such arrangement it appears that those on one side are all citizens of different states from those on the other, the suit may be removed."[1]

Under former statutes the right of the parties to remove a cause depended upon the position they occupied as plaintiffs or defendants in the pleadings.[2] But under the present law the parties are placed upon different sides of the suit, according to the facts of the case; and where all of the parties on either side desire a removal, they are entitled to it, if the requisite citizenship exists; that is, if those on one side are all citizens of different states from those on the other.

In *Removal Cases*, above cited, Mr. Justice Bradley, while concurring with the opinion of the court therein given, maintained a broader interpretation of the statute, sustained by the following argument: "In my judgment a controversy is such, as the expression is used in the Constitution and in the law, when any of the parties on one side thereof are citizens of a different state or states from that of which any of the parties on the other side are citizens. * * * It seems to me clear that in construing the present law we are not bound by the construction given to the old Judiciary Act. The words of that act, conferring jurisdiction upon the circuit courts in respect to citizenship, were not the same as those used by the present law or by the Constitution. It only conferred jurisdiction when 'the suit is between a citizen of a state where the suit is brought and a citizen of another state.' The singular number only was used, and the courts, in applying the law to cases in which there was a plurality of plaintiffs and defendants, construed it (perhaps unjustly) as requiring that each plaintiff and each defendant should have the citizenship required by law. But now it is not so. The present law follows the language of the Constitution, and gives the jurisdiction to the circuit courts in the broadest terms, namely, whenever in any suit there is 'a controversy between citizens of different

[1] Waite, C. J., in Removal Cases, 100 U. S. 457.

[2] Coal Co. *v.* Blatchford, 11 Wall. 174. Under sec. 12 of the Judiciary Act, it was held that it was not necessary for all the parties entitled to a removal to join therein at one time: Field *v.* Lownsdale, 1 Deady 288.

states;' and this broad and general expression, as I think I have shown, gives jurisdiction where any of the contestants on opposite sides of the controversy are citizens of different states."[1]

Where a suit was brought in a state court for the recovery of lands and damage for the detention of them, and the whole controversy, so far as the title was concerned, was between the plaintiff, a citizen of the state where the suit was brought, and some defendants, also citizens of that state, and others, citizens of other states, but the latter had no rights separate from the other defendants, and they were dependent wholly upon the resident defendants' right to the possession of the property, it was held that the controversy was not removable.[2]

Where a decree of a state court was rendered in 1874, and an appeal therefrom was taken in 1876 to the supreme court of the state, and in 1877 the decree was reversed and the cause remanded, "with leave to both parties to amend pleadings as they may be advised, and to take testimony, and for an account to be taken in accordance with the views taken in the opinion" of the court, and on the day after the mandate from the supreme court was received in the court of original jurisdiction, the defendant filed his petition praying that, by reason of the citizenship of the parties, the cause be removed to the proper circuit court, it was held that neither the date when nor the stage of the cause at which the petition was filed precluded the removal.[3]

A suit cannot be removed from a state court to the circuit court unless either all the parties on one side of the controversy are citizens of different states from those on the other side, or there is in such a suit a separable controversy, wholly between some of the parties who are citizens of different states, which can be fully determined as between them.[4]

For forms in cases of removal, see *post*, Forms Nos. 175–184.

[1] See also Girardy *v.* Moore, 3 Woods (C. C.) 379 (1877); Pettelon *v.* Noble, 7 Biss. (C. C.) 449. If a person who is a party to the suit joins with one who is not, in a petition for removal, this does not affect the right of the real party, as the petition will be treated in legal effect as his own petition: Meyer *v.* Delaware R. Co., 100 U. S. 457.

[2] Corbin *v.* Van Brunt, 105 U. S. 576.

[3] Hewit *v.* Phelps, 105 U. S. 393; distinguished from Jifkins *v.* Sweetzer, 102 U. S. 177. Section 643 of the Revised Statutes is not superseded by the act of March 3, 1875, c. 137: Venable *v.* Richards, 105 U. S. 636; 1 Hugh. 326.

[4] 1 Hyde *v.* Ruble, 104 U. S. 407. This case also holds that the second clause of sec. 639 of the Revised Statutes was repealed by the act of March 3, 1875.

§ 174. **Where one party is an alien.**—In considering the grounds of original jurisdiction of the circuit courts, we have shown that where an alien is a party, the other party must be a citizen of a state, and that it is not sufficient to allege that one party is an alien, but it is necessary to aver that he is a subject or citizen of some one foreign state; and that it is no objection to the jurisdiction of the court in such a case that the alien resides in the same state with the other party.[1] The same doctrine would apply in the case of an application for removal. We have also shown that a corporation is a citizen of the state creating it.[2] So also a corporation may be an alien; and where a suit is between a citizen of a state and an alien corporation, this would confer original jurisdiction upon the circuit courts, and constitute a cause of removal on the ground of citizenship.[3]

§ 175. **Manner of removal.**—The mode or manner of removal of causes from the state to the circuit courts is specifically pointed out by the statute; but, as is usual with new statutes, new questions have been presented to the federal courts, requiring a construction of it. The act on this subject provides: "That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section [§ 2], shall desire to remove such suit from a state court to the circuit court of the United States, he or they may make and file a petition in such suit in such state court before or at the term at which said cause could be first tried, and before the trial thereof, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit, if special bail was originally requisite therein; it shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in such circuit court

[1] See *ante*, § 195.
[2] See *ante*, § 191.
[3] Terry *v.* The Imperial Fire Ins. Co., 3 Dill. 408.

of the United States, the cause shall then proceed in the same manner as if it had been commenced in the said circuit court; and if in any action commenced in a state court, the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim; and the trial of the issues of fact in the circuit courts shall in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury."[1]

For form of petition and bond in such cases, see *post*, Form No. 175, *et seq.*

§ 176. **When the petition for removal must be filed.**—The petition must be filed in the state court "before or at the term at which said cause could first be tried, and before the trial thereof." If the suit was pending at the time of the passage of the act, an application for removal would be in time if made before the trial and at the first term of the court after its passage. Where a trial was had in a state court, but there was a disagreement of the jury in the case, and the cause was continued until the next term, at which term it was again continued till the following one, when a petition for removal was filed,

[1] Act of March 3, 1875, ch. 137, § 3.

it was held proper not to grant it.[1] This application did not comply with the provision of the statute requiring it to be made before or at the next term at which the cause could be tried.

But where one trial has been had and the judgment has been set aside or vacated, so that the cause stands again for a new trial, a petition for removal may then be made as if there had been no trial. In case of a reversal of a judgment of a state court on appeal or error, the right to another trial must be perfected before the application can be made.[2] Thus where the supreme court of a state reversed the judgment of a state court and granted a new trial, but on application allowed a rehearing of the same, it was held that the supreme court of the state still held jurisdiction, and that a petition filed in the meantime for a removal of the cause from the state to the circuit court was premature.[3]

The petition must be presented to the court before the trial is entered upon; but to bar the right of removal on this ground it must appear that the trial was actually and in good faith begun when the application was made; and no mere attempt of a party to get himself on the record as having commenced the trial will avail him.[4]

§ 177. **The act must be substantially complied with; sufficiency of the bond.**—It is essential that the provisions of the section be at least substantially complied with. A bond with good and sufficient surety must be filed with the petition for removal; and hence where the bond given on the application for a removal contained a blank space where the penalty of the bond should have been inserted, it was held not to be a compliance with the statute, and consequently that no right of removal existed.[5]

The petition for the removal should state the grounds of the removal clearly, whether arising from the subject matter or the citizenship of the parties, and the sufficiency of the amount in con-

[1] Bible Society *v.* Grove, 101 U. S. 610; Removal Cases, 100 U. S. 457.

[2] Insurance Co. *v.* Dunn, 19 Wall. 214.

[3] Railroad Co. *v.* McKinley, 99 U. S. 147. See also Lowe *v.* Williams, 94 U. S. 650; Vannevar *v.* Bryant, 21 Wall. 41. See also Dart *v.* McKinney, 9 Blatch. 359; Atlee *v.* Potter, 4 Dill. 559; McColough *v.* School Furniture Co., 4 Dill. 563; Palmer *v.* Call, 4 Dill. 566.

[4] Removal Cases, 100 U. S. 457; Baker *v.* Peterson, 4 Dill. 562; Hadley *v.* San Francisco, 3 Saw. 553; Merchants' and Man. Nat. Bk. *v.* Wheeler, 13 Blatch. 218.

[5] Burdick *v.* Hale, 7 Biss. 96. The state court has no discretion in the matter; Meyer *v.* Del. R. C. Co., 100 U. S. 457.

troversy, where that is required; and if the right of removal is based upon the citizenship of the parties in different states, the record or petition should show this affirmatively, and that at the time of the commencement of the suit the parties were citizens of different states.[1]

Where the petition shows proper grounds for removal, and is duly verified and filed, with a proper and sufficient bond, it is the duty of the court to accept the petition and bond, and proceed no further in the case; in fact it has no further jurisdiction of it; but if the court refuses to allow a removal, and the party entitled thereto defends the action in the state court, he loses none of his rights by so doing.[2]

§ 178. **The state court may pass upon the sufficiency of the application for removal.**—There is no right to a removal until a good petition and a bond with a good and sufficient surety are filed in the state court. These are conditions precedent to the right of removal; and the question whether they comply with the law must, in the first instance, be decided by the state court. The court in such cases is called upon to yield its jurisdiction to another court, on the ground of a compliance with certain statutory conditions, and it would appear reasonable that the state court should be allowed to pass upon this question.[3] The amount of the penalty and the required conditions should be inserted in the bond.[4]

In case of a good and sufficient petition and bond being filed in the state court, the better practice would be for the court to make an order for the removal of the cause. But this does not seem to be absolutely necessary.[5]

Where a sufficient cause for removal is shown by a petitioner, therefore, it is the duty of the state court to proceed no further with the suit. The jurisdiction of the proper circuit court then attaches, and is not lost by the failure of the petitioner to enter the record and docket the cause on the first day of the next term of

[1] Insurance Co. *v.* Pechner, 95 U. S. 183; Abranches *v.* Scheil, 4 Blatch. 256; Thurston *v.* Union P. R. Co., 3 Dill. 366; Railway Co. *v.* Ramsey, 22 Wall. 322; Kaeiser *v.* Illinois Central R. Co., 2 McCrary 187.

[2] Removal Cases, Meyer *v.* Del. R. C. Co., 100 U. S. 457.

[3] Removal Cases (Meyer *v.* Delaware R. Co.), 100 U. S. 457, where it was also held that it is not necessary that two persons should sign the bond as sureties.

[4] Burdick *v.* Hale, 7 Biss. 96.

[5] Osgood *v.* Chicago, D. & V. R. Co., 6 Biss. 330; Connor *v.* Scott, 4 Dill. 242; Commercial and Sav. Bk. *v.* Corbett, 5 Saw. 172.

the circuit court; but the entry on a subsequent day may be permitted upon good cause shown, and good cause is shown where the petition for removal has been overruled by the state court and the petitioner forced to trial upon the merits; and he loses no right by contesting the suit on its merits in the state courts in such a case.[1]

§ 179. **Personal citizenship of the parties.**—Where jurisdiction or the right of removal depends upon the proper citizenship of the parties, it requires the personal citizenship of them, even though they may act in a representative capacity, as executors or administrators. Thus, where a suit was brought by executors, and a petition for a removal averred that they, personally, had the required citizenship, it was held sufficient.[2] But merely nominal parties cannot affect the right whatever may be their citizenship.[3]

§ 180. **When a controversy is wholly between citizens of different states.**—A part or fragment of a cause cannot be removed. But when in any suit mentioned in section 2 of the act of 1875 there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between *them*, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove the suit.[4]

§ 181. **Removal on account of prejudice or local influence.**—The third subdivision of section 639 of the Revised Statutes provides for the removal of suits brought by a citizen of a state against a citizen of another state, on the ground that the non-resident party applying for the removal cannot obtain justice in the state court on account of prejudice or local influence. The provision is as follows: "When a suit is between a citizen of the state in which the suit is brought and a citizen of another state, it may be removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if, before or at the time of filing said petition, he makes and files in said state

[1] Railroad Company *v.* Koontz, 104 U. S. 5; Gordon *v.* Longest, 16 Pet. 97; Insurance Co. *v.* Dunn, 19 Wall. 214. See also King *v.* Worthington, 104 U. S. 44.

[2] Amory *v.* Amory, 95 U. S. 186; Craigie *v.* McArthur, 4 Dill. 474. The record should show the proper citizenship: Bible Society *v.* Grove, 101 U. S. 610; Insurance Co. *v.* Pechner, 95 U. S. 183.

[3] See *ante*, § 125.

[4] Harvey *v.* Ill. Mid. R. Co., 7 Biss. 103; Carraher *v.* Brennan, 7 Id. 497; Arapahoe Co. *v.* Kansas Pac. R. Co., 4 Dill. 277; Removal Cases, 100 U. S. 457.

court an affidavit, stating that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court."

The right of removal under this provision depends not only upon the proper citizenship of the parties, but upon prejudice or local influence; and suits cannot be removed on these grounds, unless they are between a citizen of the state in which the suit is brought and a citizen of another state, and then only on the petition of the non-resident party, though he may be either plaintiff or defendant.[1]

For form of petition in such cases, see *post*, Form No. 180. For forms of bonds on removal, see *post*, Forms Nos. 178, 181.

§ 182. **Application must be made to a state court of original jurisdiction.**—The statute authorizing the removal of causes from a state to the circuit court has been construed to authorize a removal only from a state court of original jurisdiction. If a cause has been tried in a state court of original jurisdiction and an appeal taken therefrom, or a writ of error obtained, and the cause stands for a rehearing in the appellate court of a state, it cannot be removed from thence to a circuit court of the United States under the federal statutes providing for the removal of causes from a state court to a circuit court of the United States.[2]

§ 183. **Removal in case of suits against corporations organized under laws of the United States.**—The Revised Statutes expressly provide that "Any suit commenced in any court other than a circuit or district court of the United States, against any corporation other than a banking corporation, organized under a law of the United States, or against any member thereof as such member, for any alleged liability of such corporation or of such member as a member thereof, may be removed for trial in the circuit court for the district where such suit is pending, upon the petition of such defendant verified by oath, stating that such defendant has a defence arising under or by virtue of the Constitution or of any treaty or law of the United States. Such removal in all other respects shall be governed by the provisions of the preceding section."[3]

It will be noticed that the ground of removal in this case is "a

[1] Bible Society *v.* Grove, 101 U. S. 610; Cook *v.* Ford, 4 Cent. L. J. 561; 2 C. L. B. 108. See also Hurst *v.* W. & A. R. Co., 93 U. S. 71.

[2] Stevenson *v.* Williams, 19 Wall. 572; Railroad Co. *v.* McMinley, 99 U. S. 147.

[3] Rev. Stat. § 640.

defence arising under or by virtue of the Constitution or any treaty or law of the United States." There seems to be no limit to the jurisdiction on account of the sum or value of the matter in dispute, as is provided by the second section of the act of March 3, 1875, which also provides for the removal of a cause from a state court by either party in case the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and the suit arises "under the Constitution or laws of the United States, or treaties made or which shall be made under their authority." But this question does not appear to be authoritatively settled. As a corporation may be a party and a citizen, the question might arise whether section 640 of the Revised Statutes was not repealed by the provision of the act of March 3, 1875, above referred to. The former statute is not in conflict with the latter, and the larger rights and privileges of corporations and members of the same under the section of the Revised Statute referred to can hardly be considered as repealed by any reasonable construction of the later act. If so, the time and mode of application of the parties mentioned in the Revised Statute would be governed by the provisions of the third subdivision of section 639 of the Revised Statutes, which does not limit the time of application so strictly as the act of 1875, nor does the right of removal depend upon the value of the matter in controversy.[1]

Under this provision the truth of the allegations of the grounds for the removal, in the petition therefor, cannot be tried on affidavits on a motion to remand, but this may be put in issue in the circuit court and settled on the trial of the case there. Nor can the rights of the corporation defendant, or a member thereof, be defeated of the right of removal by being joined with other parties not within the provisions of the statute.[2] If it is averred in the petition for removal that the defendant is a corporation or a member thereof, and if a corporation that it is not a banking corporation, organized under a law of the United States, and that the defendant has a defence under an act of Congress, giving the title of the act, this is a sufficient compliance with the statute, although it does not allege what the defence is, or the facts constituting it. But the statute

[1] That it is not repealed by the act of March 3, 1875, see Kain *v.* Texas Pac. R. Co., 3 Cent. L. J. 12; Ely *v.* Northern Pac. R. Co., 36 Leg. Int. 164; s. c., 7 W. N. 145.

[2] Fish *v.* The Union Pac. R. Co., 8 Blatch. 243. See also Fisk *v.* Union Pac. R. Co., 6 Id. 362.

has no application to a corporation created by a foreign state or government.[1]

Where in the petition for removal it was averred that the defendant was a corporation created under and by virtue of the laws of the United States, and not a banking corporation, and that it had a defence under the aforesaid laws, it was held that the corporation was entitled to a removal of the cause.[2]

For form of application for removal in such cases, see *post*, No. 180.

§ 184. **Removal of causes, civil or criminal, against persons denied any civil right.**—Section 641 of the Revised Statutes provides that "when any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, or in that part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment, or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending." The section further provides that bail or other security given shall continue, that the clerk of the state court shall furnish the defendant a copy of the record, and that when it is properly filed in the circuit court, such court shall have cognizance of the same as if originally commenced there; that if the clerk refuses to furnish a copy, the circuit court may require the plaintiff, upon reasonable notice, to file a declaration, petition or complaint in the cause, and on failure so to do may order a non-

[1] Jones *v.* The Oceanic Steam Nav. Co., 11 Blatch. 406.

[2] Turton *v.* Union Pac. R. Co., 3 Dill. 366. See also Farmers Co. *v.* Central R. Co., 3 Dill. 379. If, however, it appears from the answer of the defendant that the defence does not arise under the Constitution or laws or treaties of the United States, the cause will be remanded: Magee *v.* The Union Pac. R. Co., 2 Saw. (C. C.) 447.

suit and dismiss the cause; and that if, without the refusal of the clerk to furnish such copy, the defendant fails to file such copy in the circuit court as aforesaid, a certificate thereof is required to be given by the clerk of the circuit court, upon the production of which in the state court the cause shall proceed as if no petition for a removal had been filed.

Under this section it has been held that the denying of any right secured to a person by any law providing for the equal civil rights of citizens of the United States means a denial by some statutory provision of the state or by legislative action, and an inability to enjoy some right secured to him by the Constitution of the United States or acts of Congress providing for the equal civil rights of citizens of the United States. And it is incumbent upon the defendant who seeks a removal under this section to state the facts upon which he bases his claim for removal in his petition, duly verified by his oath, and it is not sufficient to state his belief that he cannot enforce his rights at some subsequent stage of the proceedings, as the statute has no application to judicial infractions of the constitutional amendment securing equal rights after the trial has commenced. And if there is a failure to show the facts in the petition which entitle the petitioner to a removal, the circuit court has no power to try a cause on removal, and should remand it to the state court.[1]

A criminal prosecution cannot be said to have commenced, in the sense of the law, in the state court until after an indictment is found. The object of the statute was evidently to provide a remedy for the infraction of those rights secured by the provisions of the fourteenth amendment of the Constitution to a recently emancipated race which had for a long time been held in slavery, and to give them the protection of the laws in the enjoyment of such rights.[2]

§ 185. **When the petitioner is in actual custody of a state court.**— If the defendant petitioning for a removal of a cause, as provided by the section of the statute last referred to, is in actual custody under process issued by the state court, and his petition for the removal of the cause has been duly filed in the circuit court, it is the

[1] Virginia *v.* Rivers, 100 U. S. 313. This provision was held not to be in conflict with the Constitution of the United States: Strauder *v.* West Virginia, 100 U. S. 303.

[2] Slaughter-House Cases, 16 Wall. 36; United States *v.* Reese, 92 U. S. 214.

duty of the clerk of said court to issue a writ of *habeas corpus cum causa;* and it is the duty of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said court according to law and the orders of said court, or of any judge thereof in case of vacation; and it is made the duty of the marshal, in such a case, to file with or deliver to the clerk of the state court a duplicate copy of said writ.[1]

§ 186. **Removal of suits and prosecutions against revenue and other federal officers.**—"When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; or is commenced against any officer of the United States, or other person, on account of any act done under the provisions of title xxvi., 'The Elective Franchise,' or on account of any right, title or authority claimed by such officer or other person under any of the said provisions, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court, and in the following manner: said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit, and, together with a certificate of some counsellor at law of some court of record of the state where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the penalties set forth in the petition, and that he believes them to be true, shall be presented to the said circuit court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in that court; but all bail and other security given in such suit or prosecution shall continue in like

[1] Rev. Stat. § 642.

force and effect as if the same had proceeded to final judgment and execution in a state court."[1]

If the suit was commenced in a state court by summons, subpœna, petition or any other process except capias, it is the duty of the clerk of the circuit court to issue a *certiorari* to the state court, requiring it to send to the circuit court the record and proceedings in the cause; and if it was commenced by a capias or other process by which a personal arrest is ordered, it is the duty of the clerk to issue a *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the state court or left at his office by the marshal of the district or his deputy, or by some person duly authorized thereto; and it then becomes the duty of the state court to stay all further proceedings in the cause, and it would have no further jurisdiction of it. If the defendant is in custody on mesne process therein, it is the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with according to law and the order of the circuit court, or, in vacation, of any judge thereof. If it is made to appear to the circuit court that no copy of the record and proceedings therein in the state court can be obtained, it may require the plaintiff to proceed *de novo*, and the parties can then proceed as in actions originally brought in the circuit court. If the plaintiff fails thus to proceed, the circuit court may enter a judgment of *non prosequitur* against him, with costs for the defendant.[2]

§ 187. **Petition verified; certificate of counsel.**—Under the provisions of this section of the statutes, it is only necessary to set forth in the petition facts showing the nature of the suit or prosecution so as to enable the court to determine whether it falls within the class of cases that may be removed. Where a petitioner for the removal of a prosecution in a state court, where he was held to answer an indictment for murder, stated that at the time the alleged act for which he was indicted was committed, he was, and still continued to be, a deputy collector of internal revenue of the United States; that the act for which he was indicted was done in his own necessary self-defence while engaged in the discharge of the duties of said office, and what was done in the premises was done under and by right of said office; that it was his duty as such officer to

[1] Rev. Stat. § 643.

[2] Rev. Stat. § 643. This statute was held to be constitutional in Tennessee *v.* Davis, 100 U. S. 725.

seize illicit distilleries and the apparatus used for the illicit and unlawful distillation of spirits, and that while so engaged in enforcing his duty and the law, he was assaulted and fired upon by a number of armed men, and in defence of his life he returned the fire, which was the offence mentioned in the indictment; it was held that this was a sufficient statement of the nature of the case to require a removal, and that the circuit court to which it was removed had jurisdiction to try the case.[1]

If the cause is a civil suit against any of the persons named in the statute, the petition should show this fact and the ground upon which the right of removal is based, as provided by the statute.[2]

It has been held that the post-office laws of the United States are revenue laws within the meaning of the statute providing for the removal of causes against an officer for an act done under the revenue laws of the United States. And if a suit is brought in a state court against a postmaster for a wrongful refusal to deliver a letter the latter would, under the provisions of section 643, be entitled to a removal of the same to the proper circuit court.[3] So, an action brought in a state court against a United States collector of customs to recover damages for alleged slanderous words, spoken while he was in the discharge of his duty and relating to it, is removable.[4] But a suit against a commissioner of a circuit court of the United States, to recover back money alleged to have been illegally exacted of the plaintiff, or a suit against an assistant treasurer of the United States to recover the value of bonds alleged to be unlawfully detained by him, is not suit against an officer appointed under or acting by authority of any revenue law of the United States, and is not removable from a state court on that ground.[5]

§ 188. **Suits to determine the right to an office in certain cases.**— It is provided by statute that "whenever any person is deprived of his right to any office except elector for President or Vice-President, representative or delegate to Congress, or member of a state legislature, by reason of the denial to any citizen who may offer to vote

[1] Tennessee *v.* Davis, 100 U. S. 257. See also City of Philadelphia *v.* The Collector, 5 Wall. 720; Hornthall *v.* The Collector, 9 Wall. 560.

[2] Branches *v.* Schell, 4 Blatch. 257.

[3] Warner *v.* Fowler, 4 Blatch. 311; United States *v.* Bromley, 12 How. 88.

[4] Buttner *v.* Miller, 1 Woods (C. C.) 620.

[5] Benchley *v.* Gilbert, 8 Blatch. 147; Victor *v.* Cisco, 5 Blatch. 128. See also Payton *v.* Bliss, 1 Woolw. (C. C.) 170.

of the right to vote, on account of race, color or previous condition of servitude, his right to hold and enjoy such office and the emoluments thereof shall not be impaired by such denial, and the person so defeated or deprived may bring any appropriate suit or proceeding to recover possession of such office; and in cases where it appears that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote, on account of race, color or previous condition of servitude, such suit or proceeding may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides." This jurisdiction is made concurrent with the state courts.[1]

If such a suit should be instituted in a state court, this section providing for the removal of causes would entitle the defendant to a removal to the next circuit court to be held in the district where the suit is pending, on a proper application to the court therefor. But the original jurisdiction of the circuit court in such cases, as well as that acquired by removal from a state court, depends upon the denial of certain parties the right to vote, and is limited to those actions for the recovery of title to an office of which the plaintiff has been deprived, by a denial of the right to vote on account of race, color or previous condition of servitude. Therefore, the circuit court would have no jurisdiction of a cause to recover an office into which the plaintiff had been inducted after an election, but from which he had been subsequently ejected by legal proceedings.[2]

§ 189. **Process of attachment, injunction, etc., not affected by removal.**—The act provides: "That when any suit shall be removed from a state court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered in the court in which such suit had been commenced; and all bonds, undertakings or

[1] Rev. Stat. tit. "The Elective Franchise," § 2010; Const. 15th art. of Am.; *Ex parte* Warmouth, 17 Wall. 64. See also *Ex parte* Siebald, 100 U. S. 371; *Ex parte* Lange, 18 Wall. 163; *Ex parte* Parks, 93 U. S. 18.

[2] Johnson *v.* Jumel, 3 Woods 69. Special provision is made for the removal of personal actions brought by an alien against a citizen of a state, or an officer of the United States. See Rev. Stat. § 644.

security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding such removal; and all injunctions, orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed."[1]

Under this provision the circuit court takes the suit precisely in the state and condition it was in when sent from the state court, and any action of the state court, or record made by it, will be regarded the same as though the suit had been originally commenced in the circuit court, and the same action and record there made.[2] The proceedings of the state court are in no particular vacated by the removal, and matters disposed of by it cannot be reconsidered by the circuit court, the judgment of the state court being conclusive as to them.[3]

§ 190. When a suit may be dismissed or remanded.—The act of 1875 provides that the circuit court may, in case of the removal of a suit thereto from a state court, dismiss or remand the suit to the state court. Section 5 of that act provides: "That if in any suit commenced in the circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after said suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable

[1] Act of March 3, 1875, § 4. This provision would seem to repeal, by implication, section 646 of the Revised Statutes.

[2] Section 6 of the act of 1875 provides: "That the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said state court prior to its removal." This would prevent any reconsideration of any question passed upon by the state court.

[3] Duncan *v.* Grigan, 101 U. S. 810. Under the act of 1866 it was held that injunctions were not within the saving clause of the act, and were *ipso facto* dissolved on removal: Hatch *v.* Chicago, etc., R. Co., 6 Blatch. 105. The fourth section of the act of 1875, however, expressly provides that they, as well as all orders and other proceedings, shall remain in full force. So it was held that a motion to dissolve an attachment might be made after removal, although the same motion had been passed upon by the state court: Garden City Man. Co. *v.* Smith, 1 Dill. 305. See also Carrington *v.* Florida R. Co., 9 Blatchford 467, as to proper practice in the circuit court on motions to dissolve injunctions.

under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just; but the order of said circuit court dismissing or remanding said cause to the state court shall be reviewable by the Supreme Court, on writ of error or appeal, as the case may be."

If it is manifest from the pleadings in a suit originally brought in a circuit court, or from the petition for removal thereto from a state court, that, either for want of proper subject-matter, or want of proper parties, or want of proper citizenship of the parties, to confer jurisdiction, the circuit court has no jurisdiction of the cause, it could, without request, dismiss or remand it as the case might require. But the usual practice is to call the attention of the court to these defects by demurrer or motion, as the case may require. When a suit is originally instituted in the circuit court, or brought there from a state court, it is always a proper subject of of inquiry, whether the court has or can take jurisdiction.[1]

If the petition and bond for the removal are regular and sufficient on their face, then the state court has no further jurisdiction, and it has no discretion in the matter.[2]

If a motion is made to remand the suit to the state court, this admits the averments of the petition for the removal, like a demurrer to a pleading; and if in either case these do not show the jurisdiction of the court, the cause should be remanded or dismissed.[3] And, as we have noticed, if the bond is manifestly defective, as where no sum for the penalty is inserted in it, this would be ground for remanding the cause to the state court from whence it came.[4]

If there appears to be no defect in the papers, and they conform to the requirements of the statute, issue may be taken in the circuit court on the facts stated in the petition as the ground for the re-

[1] Railroad Company *v.* McKinley, 99 U. S. 147.

[2] Fisk *v.* Union Pac. R. Co., 6 Blatch. 362; Hatch *v.* Chicago, R. I. and P. R. Co., 6 Blatch. 105; Railroad Co. *v.* Ramsey, 22 Wall. 322; Insurance Co. *v.* Dunn, 19 Wall. 214; Akerly *v.* Vilas, 2 Biss. 110; Kanouse *v.* Martin, 15 How. 198; Osgood *v.* Chicago and C. R. Co., 6 Biss. 330.

[3] Buttner *v.* Miller, 1 Woods (C. C.) 620; Dennistoun *v.* Draper, 5 Blatch. 336; Heath *v.* Austin, 12 Blatch. 320; Galvin *v.* Boutwell, 9 Blatch. 470; Wood *v.* Mathews, 2 Blatch. 370; Osgood *v.* Chicago, etc., R. Co., 6 Biss. 330.

[4] Burdick *v.* Hale, 7 Biss. 96.

moval, and the jurisdiction of the court would then be determined on a final hearing.[1]

§ 191. **When a copy of the record should be filed; refusal of the clerk to furnish it; when a writ of certiorari will issue.**—Ample provision is made to enable a party entitled thereto to procure a copy of the record on the removal of a cause, and to punish the clerk of a state court who shall refuse to furnish one on a proper application made therefor. Section 7 of the act of March 3, 1875, provides: "That in all causes removable under this act, if the term of the circuit court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the state court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said circuit court and enter an appearance therein, and if done within said twenty days, said filing and appearance shall be taken to satisfy the said bond in that behalf; that if the clerk of the state court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same a copy of the record therein, after a tender of the legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor, and on conviction thereof in the circuit court of the United States to which said action or proceeding was removed, shall be punished by imprisonment not more than one year, or by a fine not exceeding $1000, or both in the discretion of the court. And the circuit court to which any cause shall be removable under this act shall have power to issue a writ of *certiorari* to said state court, commanding said state court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law; and if it shall be impossible for the parties or persons removing any cause under this act, or complying with its provisions for the removal thereof, to obtain such copy, for the reason that the clerk of the state court refuses to furnish a copy on payment of legal fees, or for any other reason, the circuit court shall make an order requiring the prosecution in any such action or proceeding to

[1] Field *v.* Lownsdale, 1 Deady 288; 243; Heath *v.* Austin, 12 Blatch. Fisk *v.* Union Pac. R. Co., 8 Blatch. 320.

enforce forfeiture or recover the penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine, and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said circuit court shall require the other party to plead, and said action or proceeding shall proceed to final judgment; and the said circuit court may make an order requiring the parties thereto to plead *de novo*, and the bond given, conditioned as aforesaid, shall be discharged so far as it requires a copy of the record to be filed as aforesaid."

§ 192. **Issues of fact, when tried by a jury; when by the court.**— The trial of issues of fact in the circuit courts is required to be by jury; except in cases in equity and of admiralty and maritime jurisdiction, and in cases of a civil nature where the parties or their attorneys file a stipulation in writing with the clerk of the court, waiving a jury, in which case the suit may be tried by the court, and the finding of the court upon the facts, which may be either general or special, has the same effect as the verdict of a jury.[1] But under former statutes on the subject, parties, by consent, could waive the trial of issues of fact in civil cases by a jury, in the circuit and district courts of the United States, and submit both the law and the facts to the court, in conformity with the practice of the courts of the state where the trial was had.[2] When the record showed that an issue was "called for trial by the court, the jury having been waived in writing," the Supreme Court held this conclusive that the requisite agreement had been made, in the absence of anything to the contrary.[3]

No review in the Supreme Court can be had upon writ of error in such a case, unless there is a special finding from the evidence of ultimate facts by the court. If the court finds generally for one side or the other, instead of making a special finding of the facts, there can be no redress for error in that respect, although there would be for the wrongful rejection or admission of evidence during the trial.[4] If the facts are found by the court, to which exception

[1] Rev. Stat. §§ 648, 649, 700. In cases of admiralty and maritime jurisdiction, on the instance side of the court, the court should find and state the facts and conclusions of law separately: act of February 16, 1875, § 1.

[2] 13 U. S. Stat. 501 (1845); Guild *v.* Frontin, 18 How. 135. See also Suydam *v.* Williamson, 20 How. 432; Campbell *v.* Boyreau, 21 How. 223; Saulet *v.* Shepherd, 4 Wall. 502; Silsby *v.* Fort, 14 How. 219.

[3] Feleitas *v.* Cockrem, 101 U. S. 301.

[4] Dirst *v.* Morris, 14 Wall. 484;

is taken and judgment has been rendered upon them, the question for the Supreme Court on error would be, whether the facts found were sufficient to support the judgment.[1]

The provision authorizing a waiver by the parties of trial by jury relates to the circuit courts only, and does not extend to district courts. But we have noticed that the right of trial by jury of issues of fact in the district court might be waived by the parties to a suit.[2]

§ 193. Division of opinion in civil and criminal causes; certificate of division.—If there is a difference of opinion between the judges in a civil cause or proceeding in the circuit court, held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, as to any matter or thing to be decided, ruled or ordered by the court, the opinion of the presiding justice or judge will be considered the opinion of the court for the time being;[3] but whenever any question occurs on the trial or hearing of a criminal proceeding before the court upon which the judges are divided in opinion, the point upon which they disagree must, on the request of either party or their counsel, be stated under the direction of the judges, during the same term of court, and certified, under the seal of the court, to the Supreme Court at their next session. There may be further proceedings in the case in the circuit court if they may be had without prejudice to the merits of it; but where the question relates to the punishment or imprisonment of a party, no imprisonment can be allowed or punishment inflicted.[4]

And when a final judgment or decree is entered in any civil suit or proceeding in any circuit court, held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, and on the trial or hearing thereof any question has occurred upon which the opinions of the judges were opposed, the point upon which they disagree must during the same term be stated under the

Gillman *v.* Ill. and Miss. Tel. Co., 91 U. S. 603; Insurance Co. *v.* Tweed, 7 Wall. 44; Coddington *v.* Richardson, 10 Wall. 516.

[1] Jennisons *v.* Leonard, 21 Wall. 302; Dennistoun *v.* Stewart, 18 How. 565; United States *v.* City Bank, 19 How. 385. See also Suydam *v.* Williamson, 20 How. 432; Basset *v.* United States, 9 Wall. 38; Copelin *v.* Insurance Co., 9 Wall. 461.

[2] Blair *v.* Allen, 3 Dill. 101. Under the act of 1845, which also provided a right of trial by jury of issues of fact in the district courts, it was held that parties might waive a trial by jury, and submit the cause to the court to try it even on an agreed statement of facts: Henderson's Distilled Spirits, 14 Wall. 40.

[3] Rev. Stat. § 650.

[4] Rev. Stat. § 651.

direction of the judges and certified, and such certificate is required to be entered of record.[1]

For form of certificate, see *post*, Form No. 259.

§ 194. **The point of division must be distinctly stated.**—We shall consider in another place the practice and procedure in the Supreme Court on a certificate of division of opinion by the judges of a circuit court; but it may be proper here to state that the point upon which the difference occurs should be distinctly stated. If the division of opinion is on a demurrer to an indictment, it is not sufficient to certify that they were divided in opinion whether the indictment should or should not be sustained, but the particular point of disagreement should be stated.[2] The same doctrine applies to demurrers in civil suits[3] and to motions to quash indictments.[4] Nor will the Supreme Court take cognizance of a cause divided into points *pro forma*, and certified without an actual division, or of a division of opinion upon points merely hypothetical.[5]

§ 195. **The question must relate to a point of law and not of fact.**—A whole case cannot be sent up on a certificate of division of opinion, as where, in a case of chancery, the certificate stated that the judges were unable to agree in opinion as to which party was entitled to a decree, one judge being of opinion favorable to the complainant and the other favorable to the defendant, and the record of the whole case was presented to the Supreme Court. In such a case the Supreme Court will dismiss it for the want of jurisdiction.[6] The question presented must be one of law and not of fact, and not a mixed one of law and fact.[7] And the Supreme Court will dismiss a certified cause for want of jurisdiction, where the question to be determined requires an examination of the evidence in the record.[8]

§ 196. **Where the point certified is one of practice or discretion.**—If the question about which there is a division of opinion relates to

[1] Rev. Stat. §§ 652, 693. See Weyauwega *v.* Ayling, 99 U. S. 112.

[2] The United States *v.* Briggs, 5 How. 208; United States *v.* Bailey, 9 Pet. 272.

[3] Havemeyer *v.* Iowa County, 3 Wall. 294; White *v.* Turk, 12 Pet. 238; Adams *v.* Jones, 12 Pet. 213.

[4] United States *v.* Rosenburgh, 7 Wall. 580; Davis *v.* Braden, 10 Pet. 288. But see qualification of doctrine: United States *v.* Chicago, 7 How. 185; Leland *v.* Wilkinson, 10 Pet. 294.

[5] Webster *v.* Cooper, 10 How. 54; *Ex parte* Gordon, 1 Black. 503; United States *v.* Stone, 14 Pet. 524; Luther *v.* Borden, 7 How. 1.

[6] Sadler *v.* Hoover, 7 How. 646; Nesmith *v.* Shelden, 6 How. 41.

[7] Dennistoun *v.* Stewart, 18 How. 565; Kennedy *v.* Bank, 8 How. 610; United States *v.* City Bank, 19 How. 385; Daniels *v.* Railroad Co., 3 Wall. 250; Silliman *v.* Hudson River & C. Co., 1 Black 582.

[8] Brobst *v.* Brobst, 4 Wall. 2.

a matter of practice in the circuit court, and this rests upon the exercise of a sound discretion in the application of the rules which regulate the practice in the particular case, the Supreme Court will not entertain the cause.[1]

§ 197. **The Supreme Court can act only on the point presented in the certificate of division.**—The Supreme Court, on a certificate of division of opinion, will only consider the point stated in the certificate. Nothing can come before that court for its consideration in such a case except such single and definite questions as shall have actually arisen in the circuit court and become the subject of disagreement by the judges thereof.[2] If the division of opinion arises on some question subsequent to the decision of the causes in the circuit court, as where the judges disagree as to the amount of a bond for security to be given by a party on applying for a writ of error,[3] the Supreme Court would have no cognizance of it. And if a certificate of division is certified between the circuit and district judges, when the latter had no authority to sit in the case, this would not give the Supreme Court jurisdiction.[4]

§ 198. **Appellate jurisdiction of the circuit court in criminal cases.**—Besides the jurisdiction of the circuit courts which has heretofore been considered, there was conferred by the act of March 3, 1879, an appellate jurisdiction in certain criminal cases. Section 1 of that act provides: "The circuit court of each judicial district shall have jurisdiction of writs of error in all criminal cases tried before the district court where the sentence is imprisonment, or where, if fine only, the fine shall exceed the sum of three hundred dollars; and in such case a respondent feeling himself aggrieved by a decision of a district court may except to the opinion of the court, and tender his bill of exceptions, which shall be settled and allowed according to the truth, and signed by the judge, and it shall be a part of the record of the case."

Section 2 provides for a writ of error from the judgment of the district court within one year, and for a bond with sureties as

[1] Wiggins *v.* Gray, 24 How. 303; Smith *v.* Vaughan, 10 Pet. 366; Packer *v.* Nixon, 10 Pet. 411; Davis *v.* Braden, 10 Pet. 288.

[2] Perkins *v.* Hart, 11 Wh. 237; Kennedy *v.* Georgia State Bk., 8 How. 611; Ogle *v.* Lee, 2 Cr. 33; Ward *v.* Chamberlain, 2 Blatch. 430; Wyman *v.* Southard, 10 Wh. 1; Saunders *v.* Gould, 4 Pet. 392.

[3] Devereux *v.* Marr, 12 Wh. 212; Bank *v.* Green, 6 Pet. 26; U. S. *v.* Daniel, 6 Wh. 548.

[4] United States *v.* Lancaster, 5 Wh. 344.

follows: "Within one year next after the end of the term at which such sentence shall be pronounced, and not after, the respondent may petition for a writ of error from the judgment of the district court in the cases named in the preceding section, which petition shall be presented to the circuit court or circuit judge in term or vacation, who, on consideration of the importance and difficulty of the questions presented in the record, may allow such writ of error, and may order that such writ shall operate as a stay of proceedings under the sentence; but the allowance of such writ shall not so operate without such orders. The judge or justice allowing such writ of error shall take a bond with sufficient sureties that the same shall be prosecuted to effect, and that the respondent shall abide the judgment of the circuit court thereon. And if the writ shall be allowed to operate as a stay of proceedings under the sentence, bail may in like manner be taken for the appearance of the respondent at the term of the circuit court to which such writ of error shall be returnable, and that he will not depart without leave of court."

§ 199. **Return and proceedings thereon.**—Section 3 of said act further provides: "Such writ of error so allowed shall be returnable to the next regular term of the circuit court for the district, and shall be served on the district attorney of the United States for such district. The circuit court may advance all such writs of error on its docket in order that speedy justice may be done. And in case of the affirmance of the judgment of the district court, the circuit court shall proceed to pronounce final sentence and to award execution thereon; but if such judgment shall be reversed, the circuit court may proceed with the trial of said cause *de novo*, or remand the same to the district court for further proceedings."

§ 200. **Writ of error or appeal in case of the death of a party.**—Previous to the act of March 3, 1875, there was no adequate remedy, by the representatives of deceased persons by writ of error or appeal, where the deceased was a party to a final judgment or decree rendered in a circuit court, and died before the two years allowed for taking an appeal or bringing a writ of error had expired.[1] But the ninth section of that act provides in such cases as follows: "That whenever either party to a final judgment or decree, which has been or may be rendered in any circuit court, has died or shall

[1] Rev. Stat. § 1008.

die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive said suit by any formal proceeding aforesaid. The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment, and thereupon may enter an appearance or bring writ of error as the party he represents might have done. If the party in whose favor such judgment or decree was rendered has died before appeal taken or writ of error brought, notice to his representative shall be given from the Supreme Court, as provided in case of the death of a party after appeal taken or writ of error brought."

CHAPTER IX.

CIRCUIT COURTS—PRACTICE AND PROCEDURE IN SUITS AT LAW.

§ 201. **Practice and procedure in other than equity causes.**—The practice, pleadings and forms and modes of procedure in civil causes, other than those in equity and admiralty, in the circuit and district courts must conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held.[1] But the jurisdiction of the circuit court is not in any respect extended by the provisions of the section last cited.[2]

The practice, pleadings, forms and mode of proceedings in civil causes embraced in this section are those established by the statutes of the state, and not modes of procedure established by judicial construction of the common law remedies; although the term "practice" embraces rules adopted to facilitate the transaction of business before the court in a proper and orderly manner, as rules of practice when framed by the courts or embodied in statutes. But no construction should be given to a statute of the state relating to practice or procedure, to affect the substantial rights of any suitor secured by act of Congress.[3]

The language of the statute is that the practice, pleadings, forms and modes of proceeding "shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in the courts of record of the state." The words "as near as may be" are quite indefinite, but they were perhaps wisely conceived, as they give the judges some latitude in their construction, and enable them to reject any rule or provision of the state statutes relating to practice or procedure which in their judgment would encumber the proper administration of the law or defeat the ends of justice.[4]

[1] Rev. Stat. § 914.

[2] Bath County *v.* Amy, 13 Wall. 244; Main *v.* Second Nat. Bank, 6 Biss. 26.

[3] Butler *v.* Young, 5 C. L. N. 146; Sandford *v.* Portsmouth, 6 Cent. L. J. 147; Republic Ins. Co. *v.* Williams, 3 Biss. 370; Nudd *v.* Burrows, 91 U. S. 426.

[4] Indianapolis & St. L. R. R. Co. *v.* Horst, 93 U. S. 291; Sandford *v.* Portsmouth, 6 Cent. L. J. 147. The

It follows from the provision of the statute under consideration that the federal courts have no authority by rules or otherwise to prescribe any mode of practice or procedure in derogation of the provisions of this statute; but where a law of Congress has pointed out a special mode of procedure in relation to the particular subject-matter involved in the proceeding, the federal court cannot adopt the forms and modes of proceeding of the state courts, but should follow the forms and modes pointed out by the act.[1]

§ 202. **The summons or other original process and service.**—The original process issued to the defendant at the commencement of a suit at law should be signed by the clerk and under the seal of the court; and it should substantially comply with the requirements of the state law in reference to original process for the commencement of a suit.[2] Where a state law required that upon every process issued in an action to recover a penalty or forfeiture there should be endorsed a general reference to the statute under which the penalty or forfeiture is claimed, it was held that this provision should be observed in commencing suits in the federal courts, and that a reference to such statute should be indorsed upon the original process issued by said courts in like cases.[3]

In reference to the service of process it may be said that it is a "mode of proceeding" within the meaning of the section under consideration; that this should be in accordance with the requirement of the state law, and the federal courts can prescribe no other mode of service.[4] The process should run in the name of "The President of the United States," and be directed to the marshal of the district, whose duty it is to execute all lawful precepts directed to him and issued under the authority of the United States.[5] The marshals and their deputies have in each state the same powers in executing the laws and process issued by the courts of the United States as the sheriffs and their deputies have in such state in exe-

section has no application to cases in equity or admiralty: Blease *v.* Garlington, 92 U. S. 1.

[1] Easton *v.* Hodges, 7 Biss. 324.

[2] Rev. Stat. § 911; Johnson *v.* Healey, 9 Ben. 318; Dwight *v.* Meritt, 4 Fed. Rep. 614.

[3] Brown *v.* Pond, 5 Fed. Rep. 31; Brown *v.* Pond, 5 Fed. Rep. 41. The section last cited does not authorize the commencement of an action by a summons issued in the name of the plaintiff's attorney, although that may be the mode prescribed by the state law: Martin *v.* Criscuola, 10 Blatch. 211.

[4] Perkins *v.* City of Watertown, 5 Biss. 320.

[5] Rev. Stat. § 787.

cuting the laws and process of the courts thereof, and a deputy marshal may execute process directed to the marshal.[1]

Original and all other process issued from the federal courts must bear test from the day of such issue, and if the marshal or his deputy is a party in any cause, the writs and precepts therein must be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person thus appointed has authority to execute and return them.[2] But it has been held that subpœnas and ordinary notices stand on different grounds, and that they may be served by any person in conformity with the statutory provisions of the state within which the cause is pending.[3]

§ 203. **Jurisdiction not acquired by attachment against a non-resident.**—The questions recently presented to the Supreme Court were whether jurisdiction of the circuit court over a non-resident defendant could be acquired by an attachment of property within the district, and whether, on the dismissal of a cause by the circuit court for the want of jurisdiction in such a case, the Supreme Court ought by mandamus to compel the circuit court to restore the cause and proceed to try it. On a motion to the court for the writ it was refused.[4] Under the provisions of the act of 1789 it was also held that the process of foreign attachment would not confer jurisdiction where the defendant was not an inhabitant of nor served with process within the district where the suit was brought.[5]

§ 204. **Service of process may be waived.**—The service of process against the person of the defendant must be made within the district where the court is held, but if not so served and the defendant is not a resident of the district, he may waive the necessity of such service by a voluntary appearance to the suit without objection. And in such a case the omission to aver on the record that the defendant is an inhabitant of the district or found therein will not be fatal, but the regularity of the service will be presumed.[6]

[1] Schwabacker *v.* Reilly, 2 Dill. 127; James *v.* Jenkins, Hemp. 187; Rev. Stat. § 788.

[2] Rev. Stat. §§ 912, 922; Admiralty Rule 1.

[3] Schwabacker *v.* Reilly, 2 Dill. 127.

[4] *Ex parte* Railroad Co., 103 U. S. 794. But see attachments against the property of defaulting or delinquent postmasters, contractors, or other officers, agents or employes of the Post-Office Department, Rev. Stat. § 924.

[5] Hollingsworth *v.* Adams, 2 Dall. 396; Pollard *v.* Dwight, 4 Cr. 421; Fisher *v.* Consequa, 2 Wash. C. C. 382; *Ex parte* Railroad Co., 103 U. S. 794; *ante*, § 202; *post*, § 208.

[6] Gracie *v.* Palmer, 8 Wh. 605; Pollard *v.* Dwight, 4 Cr. 421; Toland *v.* Sprague, 12 Pet. 300; Levy *v.* Fitzpatrick, 15 Id. 167.

§ 205. **In what cases the several circuit and district courts may make their own rules and orders.**—The circuit and district courts may from time to time, in any manner not inconsistent with any law of the United States or any rule prescribed by the Supreme Court of the United States in relation to the practice, procedure and pleadings in equity and admiralty, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the taking and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings in said courts.[1]

Under the section last cited it is not essential that the rules be adopted, written rules, but rules recognized by a uniform mode of procedure for a series of years are equally binding and become the rules of the court.[2] No rule of a federal court, however, can exclude competent evidence which is admissible by the general principles of law.[3] But under this provision the circuit courts may adopt rules providing a form for a bill of exceptions, requiring parties to print their briefs, and for making up the trial docket.[4] And a court may suspend its own rules or except a particular operation of them whenever the purposes of justice require it.[5]

§ 206. **Pleading, practice and procedure to conform to state courts.**—In reference to the pleadings, practice and procedure in civil causes other than those of equity and admiralty, the language of the statute is as follows: "The practice, pleadings and forms and modes of procedure in civil causes other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."[6]

For appropriate forms in various suits at law, see *post*, No. 1, and following.

[1] Rev. Stat. § 918.

[2] Duncan *v.* United States, 7 Pet. 435; Fullerton *v.* Bank, 1 Id. 604; Koning *v.* Bayard, 2 Paine 251; Russell *v.* Ashley, Hemp. 546; Sellers *v.* Corwin, 5 Ohio 398.

[3] Patterson *v.* Winn, 5 Pet. 233.

[4] Neff *v.* Pennoyer, 3 Saw. 335; The Alice Tainter, 14 Blatch. 225; Pomeroy *v.* State Bank, 1 Wall. 592.

[5] United States *v.* Breitling, 20 How. 252; Russell *v.* McLellan, 3 W. & M. 157; Wallace *v.* Clark, Id. 359.

[6] Rev. Stat. § 914.

If the original process is substantially in compliance with the state law it will not be set aside, but a summons issued to the defendant at the commencement of the suit must be under the seal of the court and signed by the clerk;[1] and it must be served by a marshal or his deputy, unless he is interested, although the state laws allow such a service to be made by a state officer or by a private person.[2] The service may be made in the mode prescribed by the law of the state.[3] But the jurisdiction of this court cannot be extended over persons who are not rightfully within the reach of such process under the federal statutes.[4]

If the state law allows a suit, jointly, against parties severally liable upon a bond;[5] or permits a joint action against the makers and endorsers of a note;[6] or the principal to sue on a bond made to an agent;[7] or advantage to be taken of the statutes of limitation by demurrer;[8] or an amendment of pleading as a matter of course after a demurrer;[9] the same practice is proper in the federal courts. In fact the practice here must conform to the state law as interpreted by the state courts, as nearly as practicable.[10]

If a state law permits a judgment to be entered on a supersedeas bond, after a return of *nulla bona* on an execution against the debtor, a similar judgment may be entered in the federal courts;[11] and a state law permitting a plaintiff, on motion, to take judgment against a marshal for money collected and not paid over will be adopted in the federal courts, although they cannot enforce a penalty in this summary way against the marshal for the neglect.[12]

Although a state law may provide for the reference of causes, the federal courts cannot adopt this practice without the consent of both parties, as by the federal statutes either party is entitled to a trial by jury in suits at law.[13] But a circuit court may grant a new

[1] Johnson *v.* Healy, 9 Ben. 318; Dwight *v.* Merritt, 4 Fed. Rep. 614; Martin *v.* Criscuola, 10 Blatch. 211.

[2] Schwabacker *v.* Reilly, 2 Dill. 127.

[3] Perkins *v.* City of Watertown, 5 Biss. 320.

[4] Main *v.* Second Nat. Bk., 6 Biss. 24; Toland *v.* Sprague, 12 Pet. 300; Picquet *v.* Swan, 5 Mas. 35.

[5] United States *v.* Tracy, 8 Ben. 1.

[6] Fullerton *v.* Bank, 1 Pet. 604.

[7] Weed Sewing Mach. Co. *v.* Weeks, 3 Dill. 261.

[8] Chemung Canal Bank *v.* Lowrey, 93 U. S. 72.

[9] Rosenbach *v.* Dreyfuss, 1 Fed. Rep. 391; West *v.* Smith, 101 U. S. 263.

[10] Republic Ins. Co. *v.* Williams, 3 Biss. 370; Brown *v.* Chesapeake and O. Canal Co., 4 Fed. Rep. 770; Wilcox *v.* Hunt, 13 Pet. 378; Sawin *v.* Kenny, 93 U. S. 289; Taylor *v.* Brigham, 3 Woods 377.

[11] Smith *v.* Gaines, 93 U. S. 341; Hiriat *v.* Ballou, 9 Pet. 156.

[12] Givin *v.* Breedlove, 2 How. 29.

[13] Howe Machine Co. *v.* Edwards, 15 Blatch. 402.

trial after a report by a referee, when a case has been properly referred to him, if such is the proper practice in the state court.[1] The practice of taking depositions, and to compel the production of books and writings in the possession of an adverse party, is provided for by the federal statutes, and therefore is not governed by the state laws.[2] Nor can a party to an action at law be examined before the trial at the instance of the adverse party, except in cases where it is specially authorized under the federal statutes.[3]

If a state law allows a defendant to appear specially and move to quash an attachment for want of jurisdiction, or a judgment by default to be set aside, or requires notice to be given of a hearing of a demurrer, the practice of the state courts must be pursued.[4] But statutes of a state relating merely to the mode of submitting a case to a jury, or requiring a judge to instruct the jury specially upon particular questions of fact involved in the issues in addition to their general verdict, or requiring the judge to reduce his instructions to writing, or that permit the jury to take the instructions and books and papers, which have been used in evidence, with them when they retire to agree on their verdict, or that allow a second trial, or motions for a new trial, are not binding upon the federal courts and have no application to federal practice.[5]

§ 207. **Intervention, reference, bail, imprisonment.**—If a state law allows a party to intervene for the purpose of claiming property, or for any other purpose, the same practice may be pursued in the federal courts.[6] If, with the consent of both parties, a cause is referred to a referee, a judgment may be entered upon his report, if that would be in accordance with the state law; and if a new trial may be granted by the law of the state it may be granted by the federal courts; but a cause cannot be referred without the consent of both parties where they have a right to a trial by jury.[7]

[1] Robinson *v.* Insurance Co., 16 Blatch. 194.

[2] Sage *v.* Tauszky, 6 Cent. L. J. 7; United States *v.* Pings, 4 Fed. Rep. 714; Easton *v.* Hodges, 7 Biss. 324.

[3] Easton *v.* Hodges, 7 Biss. 324; Beardsley *v.* Little, 14 Blatch. 102; Corbett *v.* Gibson, 16 Blatch. 336.

[4] Rosenbach *v.* Dreyfuss, 2 Fed. Rep. 23; Republic Ins. Co. *v.* Williams, 3 Biss. 370; Nazro *v.* Cragin, 3 Dill. 474.

[5] Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291; Hankin *v.* Squires, 5 Biss. 186; Nudd *v.* Burrows, 91 U. S. 426; Newcomb *v.* Wood, 97 U. S. 581.

[6] Featherman *v.* Louisiana State Sem., 2 Woods 71; Bank *v.* Labilut, 1 Woods 11.

[7] Howe Machine Co. *v.* Edwards, 15 Blatch. 402; Fourth Nat. Bank *v.* Neyhardt, 13 Blatch. 393; Robinson *v.* Insurance Co., 16 Blatch. 194.

Special bail, in a cause in the circuit courts, may surrender the debtor in pursuance of the state laws;[1] and a debtor imprisoned under an execution from a federal court is entitled to the privileges of the jail limits as fixed by the law of the state.[2]

§ 208. **Attachments in common law causes.**—In common law causes, in the circuit and district courts, the plaintiff is entitled to similar remedies by attachment and other process, against the property of the defendant, to those which are provided by the laws of the state in which such court is held for the courts thereof; and such circuit and district courts may from time to time, by general rules, adopt such state laws as may be in force in the states where they are held, in relation to attachments and other process; but similar preliminary affidavits or proofs, and similar security, as required by such state laws, must be first furnished by the party seeking such attachment or other remedy.[3]

Original process from the circuit courts cannot be served on parties beyond the limits of the district where they are issued, so as to confer jurisdiction on the courts; and the provisions of the statute last cited, giving the remedies by attachment and other process against the property of the defendant which are provided by the laws of the state, adopts the state remedy and the form and mode of service of the process, but it does not enlarge the sphere of jurisdiction of the court by enabling the plaintiff to compel the appearance of a defendant where he is not amenable to the process of the court *in personam*. The process of foreign attachment served on the property of a non-resident of the district does not confer jurisdiction on the court, unless he is found and served within the district with process *in personam*. This must be done before or at the time of serving the attachment; and it has been held that service after the attachment was levied would not give the court jurisdiction. But a general and voluntary appearance of a defendant in a suit where there is service only of the attachment within the district will give the court jurisdiction.[4]

In case of an attachment, it can only properly issue as a part of

[1] Beers *v.* Haughton, 9 Pet. 329.

[2] United States *v.* Knight, 14 Pet. 301.

[3] Rev. Stat. § 915. For mode of proceeding on attachment in special cases, see Rev. Stat. § 924, *et seq.* Property taken or detained by any officer or other person under authority of any revenue laws is not repleviable: Id., § 934.

[4] Toland *v.* Sprague, 12 Pet. 300; Picquet *v.* Swan, 5 Mason 35; Chittenden *v.* Darden, 2 Woods 437.

and in connection with process to be served upon the defendant *in personam;* and he must be served with the latter process, and have an opportunity to defend himself, or the federal court cannot have jurisdiction of the suit.[1] An attachment cannot afford the means of acquiring jurisdiction over a person who is not an inhabitant of nor found within the state where the suit is brought. The court must acquire jurisdiction over the defendant personally before the plaintiff can have the benefit of this auxiliary remedy by attachment.[2] The attachment must be contemporaneous with the personal service of original process within the district, or follow it, or the federal court can take no cognizance of the cause.[3]

§ 209. **Executions in common law causes.**—The party recovering a judgment in any common law cause in any circuit or district court is entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are provided in like causes by the laws of the state as they existed at the time of the adoption of the Revised Statutes, or any such laws thereafter enacted which may be adopted by general rules of the circuit or district court; and such courts have authority to adopt, from time to time, such state laws, by general rules.[4]

The rights conferred upon parties by virtue of the section last cited are subject to the provisions of the statutes of the state relating to bail, stays and exemptions of property from execution.[5]

The forms of writs, executions and other process of the state courts may undoubtedly be followed in the federal courts by the clerks thereof.[6] But writs of execution issued from the federal courts cannot be controlled, in their general effect and operation, by the provisions of the state law.[7] Thus, if a state law requires the plaintiff to endorse on the execution that certain bank notes will be received in

[1] Sadler *v.* Hudson, 2 Curt. 7; Allen *v.* Blunt, 1 Blatch. 480; Day *v.* Newark Man. Co., 1 Blatch. 628; Levy *v.* Fitzpatrick, 15 Pet. 171; Manro *v.* Almeida, 10 Wh. 473; Chittenden *v.* Darden, 2 Woods 437.

[2] Nazro *v.* Cragin, 3 Dill. 474; *ante*, § 303.

[3] Chittenden *v.* Darden, 2 Woods 437; *Ex parte* Railroad Co., 103 U. S. 794.

[4] Rev. Stat. § 916.

[5] Beers *v.* Houghton, 9 Pet. 329; Boyle *v.* Zacherie, 6 Pet. 648; Ross *v.* Duval, 13 Pet. 45; United States *v.* Knight, 14 Pet. 301; Ames *v.* Smith, 16 Pet. 303; Massingill *v.* Downs, 7 How. 760; Wyman *v.* Southard, 10 Wh. 1; Mason *v.* Haile, 12 Wh. 370.

[6] Rev. Stat. § 911; United States *v.* Humphreys, 3 Hughes 201.

[7] United States *v.* Halstead, 10 Wh. 51; Ross *v.* Duval, 13 Pet. 45; Ames *v.* Smith, 16 Pet. 303; Howe *v.* Freeman, 80 Mas. 566.

satisfaction of the same, such a provision is not applicable to an execution issuing from the federal courts.[1]

If a mandamus is the proper remedy in the highest state court, to compel the levy of a tax for the satisfaction of a judgment against a municipal corporation, where the judgment creditor has no other means of obtaining satisfaction, this remedy would be appropriate in the federal courts, and a party having such a judgment would be entitled to this remedy in any of those courts held in the state, and an injunction issued by a state court to restrain such a levy would be inoperative against such a mandamus.[2]

A judgment creditor may have the same remedy against a municipal corporation as the state law allows against private individuals in similar cases, even though the state law does not allow that remedy against the corporation.[3] So, if a state law requires a demand and notice in case of an attachment of mortgaged property by virtue of judgment, it does not apply to an attachment issued on a judgment in a federal court.[4]

If land is liable to be taken on execution under the laws of the state, it may be taken on execution issued upon a judgment of a federal court, rendered within the state.[5]

§ 210. **Judgment liens.**—The judgment of a federal court is a lien from the fact that its effect and the process thereon are the same as on judgments in the state courts; and these liens extend throughout the district in which they are rendered, in all cases and in like circumstances, as judgments of the state courts are liens in more limited districts where they are rendered. In those states where the lien of a judgment of the state courts is limited to the lands or other property within the county where the judgment is rendered, a similar judgment in a federal court, entered in such state, would create a similar lien upon the same property within the territorial limits of the district.[6]

[1] Wyman *v.* Southard, 10 Wh. 1.

[2] United States *v.* Keokuk, 6 Wall. 514; Riggs *v.* Johnson Co., 6 Wall. 166; Wyman *v.* Southard, 10 Wh. 1.

[3] New Orleans *v.* Morris, 3 Woods 115.

[4] Howe *v.* Freeman, 80 Mas. 566.

[5] United States *v.* Graves, 2 Bock. 379; Bank *v.* Halstead, 10 Wh. 51; Koning *v.* Bayard, 2 Paine 251.

[6] United States *v.* Humphreys, 3 Hughes 201; Shrew *v.* Jones, 2 McLean 78; United States *v.* Morrison, 4 Pet. 124; Barth *v.* McKeever, 4 Biss. 206; Williams *v.* Benedict, 8 How. 107; Ward *v.* Chamberlain, 2 Black 430; Koning *v.* Bayard, 2 Paine 251; Massingill *v.* Downs, 7 How. 760; Lombard *v.* Bayard, 1 Wall. Jr. 196; Reed *v.* House, 2 Humph. 576. Judgment and decrees of federal courts cease to be liens within the same period of limitation as the judgments and decrees of state courts: Rev. Stat. § 967.

CHAPTER X.

CIRCUIT COURTS—PRACTICE AND PROCEDURE IN EQUITY.

§ 211. **Mesne process and proceedings in equity.**—Section 913 of the Revised Statutes provides: "The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty jurisdiction in the circuit and district courts shall be according to the principles and usages which belong to courts of equity and admiralty, respectively, except when it is otherwise provided by statute or by rule of court made in pursuance thereof; but the same shall be subject to such alteration by the Supreme Court, by rules prescribed from time to time, to any circuit or district court, not inconsistent with the laws of the United States."

The Supreme Court has promulgated at various times rules of practice and procedure for the courts of equity of the United States,[1] and given the circuit courts authority to make other rules and regulations for the practice, proceeding and process, mesne and final, in their respective districts, not inconsistent with federal statutes or those prescribed by the Supreme Court, and from time to time to alter and amend the same.[2] These courts may, as courts of equity, establish rules in relation to time and manner of appearing and answering, and may mould them in this respect so as to enlarge the time when it shall appear that the administration of justice requires it.[3] So they may establish the practice relating to the mode of conducting trials, the order of introducing evidence, and the time when it must be introduced, unless these matters shall be regulated by some fixed general rules by the Supreme Court under some act of Congress, or by some federal statute.[4]

§ 212. **Equity and admiralty rules prescribed by the Supreme Court.**—The Supreme Court has authority to regulate the practice and procedure in equity and admiralty in the several circuit and district courts of the United States; but they should be consistent

[1] See *post*, Rules in Equity.

[2] Equity Rule 89; Bank of U. S. *v.* White, 8 Pet. 262.

[3] Poultney *v.* City of Lafayette, 12 Pet. 472.

[4] The Philadelphia, etc., R. Co. *v.* Stimpson, 14 Pet. 448.

with the principles, rules and usages which belong to courts of equity and admiralty respectively. That court has, in reference to chancery practice, provided that, in all cases where the rules prescribed by the Supreme Court or by the circuit court under the rule last cited do not apply, the practice of the circuit court shall be regulated by the practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held; not as positive rules, but as furnishing just analogies to regulate the practice.[1]

By this rule the practice of the English High Court of Chancery regulates the practice of the circuit courts in the exercise of chancery jurisdiction, subject to the limitations contained therein. The jurisdiction and practice of these courts in equity are the same in all the states, and the rule of decision is the same in all of them. They cannot be regulated by the law or practice of the states; but equitable remedies must be according to the practice of courts of equity in the parent country as contradistinguished from courts of law, subject to such changes as may be made by acts of Congress, or by rules adopted by the courts of the United States in the exercise of the powers delegated to them by such acts.[2]

§ 213. **Power of the Supreme Court to regulate the practice in the circuit and district courts, in equity and admiralty.**—The power of the Supreme Court to prescribe rules regulating the practice and procedure in equity in the circuit and district courts is expressly conferred by the Revised Statutes, which provide as follows: "The Supreme Court shall have power to prescribe from time to time, in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice to be used in suits in equity or admiralty by the circuit

[1] Equity Rule 90; Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. 421; Robinson *v.* Campbell, 3 Wh. 212; Story *v.* Livingston, 13 Pet. 359; Wyman *v.* Southard, 10 Wh. 1; Duncan *v.* Durst, 1 How. 301; Pomeroy *v.* Main, 2 Paine 476.

[2] Boyle *v.* Zacherie, 6 Pet. 648; Story *v.* Livingston, 13 Pet. 359; Rhode Island *v.* Massachusetts, 12 Pet. 657; s. c., 15 Pet. 233; Smith *v.* Burnham, 2 Sum. 612.

and district courts."[1] But the several circuit and district courts may from time to time, and in a manner not inconsistent with any law of the United States, or any rule prescribed by the Supreme Court under the preceding paragraph, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary and convenient for the advancement of justice and the prevention of delays in proceedings.[2]

These courts can adopt a practice not inconsistent with the rules of practice prescribed by the Supreme Court for them; and they may exercise discretionary powers in those cases where no provision is made by such rules or by acts of Congress.[3] It is not necessary that they should adopt written rules, but these may be established by a uniform course of proceeding for a series of years.[4] Under the provisions of the Revised Statutes, the circuit and district courts may require parties to print their briefs;[5] and may adopt a rule for making up the trial docket, and for making the clerk's fee for note of issue a part of the taxable costs.[6] And these courts may suspend their own rules, or except a particular case from their operation, wherever the demands of justice require it.[7]

§ 214. **Affirmation in lieu of oath.**—Where under the general equity rules an oath is or may be required or taken by a party, if he has conscientious scruples against taking an oath he may, in lieu thereof, make solemn affirmation to the truth of the facts stated by him.[8]

§ 215. **The circuit courts as courts of equity always open; when clerk's office open; rule days.**—By virtue of the delegated authority conferred upon the Supreme Court of the United States, it has framed and adopted certain general rules of practice for the courts

[1] Rev. Stat. § 917. The rules prescribed by the Supreme Court have the force and effect of statutory provisions, if not inconsistent with the laws of the United States: The Illinois, 1 Brown 13; Gaines *v.* Travis, Abb. Ad. 422; Gray *v.* Chicago, etc., R. Co., 1 Wool. 63; The St. Lawrence, 1 Black. 522.

[2] Rev. Stat. § 918.

[3] Bank of United States *v.* White, 8 Pet. 262.

[4] Duncan *v.* United States, 7 Pet. 435; Koning *v.* Bayard, 2 Paine 251.

[5] Neff *v.* Pennoyer, 3 Saw. 335.

[6] The Alice Tainter, 14 Blatch. 225.

[7] United States *v.* Breitling, 20 How. 252; Russell *v.* McLellan, 3 W. & M. 157; Wallace *v.* Clark, 3 W. & M. 359.

[8] Equity Rule 91.

of equity of the United States, and the first is that "the circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules and other proceedings, preparatory to hearing of all causes upon their merits."[1]

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entertaining and disposing of all motions, rules, orders and other proceedings which are grantable of course and applied for or had by parties or their solicitors, in all causes pending in equity in pursuance of the rules prescribed.[2]

§ 216. **Certain orders by a judge in vacation to have the same effect as if made by the circuit court in term time.**—It is provided by Equity Rule 3 that "any judge of the circuit court, as well in vacation as in term time, may, at chambers or on the rule days of the clerk's office, make and direct all interlocutory orders, rules and other proceedings preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice thereof being first given to the adverse party or his solicitor to appear and show cause to the contrary, at the next rule day thereafter, unless some other time is assigned by the judge for the hearing."

§ 217. **Entry of orders, rules and motions by the clerk; rule days.**—All motions, rules, orders and other proceedings made and directed at chambers or on rule days at the clerk's office, whether special or of course, must be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed, which book must be open at all hours to the free inspection of the parties in any suit in equity and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices and other proceedings entered in such order-book, touching any and all matters in the suits to and in which they are parties and solicitors. And notice

[1] Equity Rule 1.

[2] Equity Rule 2.

to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. And where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders or other proceedings not requiring personal service on the parties, in their discretion.[1]

§ 218. **Motions for process, etc., granted by the clerk of course.**—It is also provided by a general rule regulating the practice in equity that "all motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso;* for filing exceptions, and for other proceedings in the clerk's office which do not by the rules require any allowance or order of the court or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended or altered or rescinded by any judge of the court, upon any special cause shown."[2]

For forms in such cases, see *post*, No. 31, *et seq.*

§ 219. **Motions not grantable of course.**—Equity Rule 6 provides for the practice in case of motions not granted as a matter of course. It is as follows: "All motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by the judge of the court, be made on rule day and entered in the order-book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party or his solicitor shall not then appear, or shall not show good cause against the same, the motion shall be heard by any judge of the court *ex parte* and granted as if not objected to or refused, in his discretion."

A motion to produce a paper in the possession of the opposite party, and which it is desired to use in evidence, is not a motion grantable of course, or without notice; but if it is desired to enable the party to plead, it may be granted in the discretion of the court,

[1] Equity Rule 4.

[2] Equity Rule 5. A federal court, in equity, may mould its rules in relation to the time and manner of appearing and answering, so as to prevent them from working injustice: Poultney *v.* Lafayette, 12 Pet. 472.

without notice.[1] Nor is a motion for the appointment of commissioners to take testimony grantable of course. Special motions are not grantable of course, and generally require the allowance of the judge, after notice to the opposite party.[2] But previous notice of a motion for the appointment of a receiver is not necessary, where the counsel for the opposite party is present in court at the time.[3]

For forms in equity, see *post*, No. 25, *et seq.*

§ 220. **Subpœna and attachment; proper mesne process.**—The process of subpœna constitutes the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and unless otherwise provided by the general rules in equity, or specially ordered by the circuit court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration or a writ of assistance, to enforce the delivery of possession, as the case may require, is the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.[4]

Jurisdiction over parties in the circuit or district courts in equity, *in personam*, can only be acquired by the proper service of the process of subpœna within the district where the court is held, or by their voluntary appearance in the suit. If the necessary parties cannot be served within the district, and they do not voluntarily appear, the bill will be dismissed for want of jurisdiction.[5] The statute, as we have seen, does not allow jurisdiction of a suit against a non-resident to be acquired merely by attachment of property of the defendant within the state, so as to authorize a personal judgment, unless personal service upon the defendant is made within the district. The auxiliary remedy by attachment does not afford the means of acquiring jurisdiction.[6] Proceedings in equity against property of a non-resident defendant are, however, authorized in certain cases;[7] but no process of subpœna can issue from the clerk's office in any suit in equity until the bill is filed in his office.[8] We

[1] Bronson *v.* Kinzie, 3 McLean 180.
[2] United States *v.* Parrott, 1 McAll. 447.
[3] McLean *v.* The Lafayette Bank, 3 McLean 503.
[4] Equity Rule 7.
[5] Herndon *v.* Ridgeway, 17 How. 424. See also Vattier *v.* Hinde, 7 Pet. 252.
[6] Toland *v.* Sprague, 12 Pet. 300; Picquet *v.* Swan, 5 Mason 35; Nazro *v.* Cragin, 3 Dill. 474; *Ex parte* Railroad Co., 103 U. S. 794; Rev. Stat. § 739; act June 4, 1880.
[7] Act March 3, 1875, c. 137, § 8.
[8] Equity Rule 11.

will hereafter consider the proper form and frame of bills in equity, and what they must contain and what may be omitted in them.

For form of subpœna, see *post*, No. 32.

§ 221. **Original process of subpœna, when returnable.**—Whenever a bill is filed, it is the duty of the clerk to issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which must be returnable into the office of the clerk the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpœna must be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable, or the bill may be taken as confessed. If there is more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, except in case of husband and wife defendants, or a joint subpœna may be sued out against all the defendants.[1]

§ 222. **Mode of serving process of subpœna; alias subpœnas; who may serve.**—The service of a subpœna must be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family.[2] If any subpœna is returned not executed as to any defendant, the plaintiff is entitled to another subpœna, *toties quoties*, against such defendant, if he requires it, until due service is made.[3] The service of all process, mesne and final, shall be by the marshal of the district or his deputy, or by some person specially appointed by the court for that purpose, and not otherwise. In the latter case the person making the service must make affidavit of the same.[4] In the case of service by the marshal or his deputy, a certificate of the fact would be sufficient evidence of the same.

For form in such cases, see *post*, No. 32.

It is the duty of a marshal to serve process as soon as he reasonably can, and he is liable on his bond for any loss occurring through the negligence or unreasonable delay of himself or his deputy in serving the same. The measure of his liability is the extent of the

[1] Equity Rule 12.
[2] Equity Rule 13.
[3] Equity Rule 14.
[4] Equity Rule 15.

injury caused by the negligence or delay. If the loss of a debt is the direct legal consequence of the failure to serve or of negligent delay, the amount of the debt is the measure of damages; but the mere failure to serve a subpœna does not necessarily infer the loss of the debt, because the plaintiff may sue out another one. The question whether the loss of a debt resulted from the delay or failure of the marshal or his deputy to serve the process is a question of fact depending upon the circumstances, of which a jury must judge.[1] If the deputy fails to obey the commands of the writ without legal excuse, or if in the execution thereof he violates the rights of others, the marshal is liable to the party injured.[2]

§ 223. **Docketing cause; appearance day; entry of appearance.** —It is the duty of the clerk, upon the return of a subpœna served and executed upon any defendant, to enter the suit upon his docket as pending in the court, and to state the time of the entry. The defendant must appear on the rule day to which the subpœna is made returnable, provided he has been served with the process twenty days before that day; otherwise his proper appearance day will be the next rule day succeeding. And the appearance of the defendant, either personally or by his solicitor, should be entered by the clerk in the order book on the day thereof.[3]

But no civil action can be brought before either the district or circuit court, by any original process or proceeding, in any other district than that whereof the defendant is an inhabitant or in which he shall be found at the time of service of such process or commencing such proceedings, except in some special cases, which we have noticed.[4] The defendant, however, by an appearance in the case without objection to the service, will thereby waive the omission or defect of service, and give the court jurisdiction of the person. Thus, if the defendant in a suit in equity appears and answers the bill, he cannot, on the hearing, object that the bill contains no prayer for process, or that he was not served with process. And a general appearance, personally or by counsel, cures all antecedent defects or irregularities of process.[5]

[1] The United States *v.* Moore's Adm'rs, 2 Brock. 317; Kennedy *v.* Brent, 6 Cr. 187.

[2] Insurance Co. *v.* Adams, 9 Pet. 573.

[3] Equity Rules 16, 17.

[4] Act of 1875, §§ 1, 8.

[5] Knox *v.* Summers, 3 Cr. 496; Gracie *v.* Palmer, 8 Wh. 699; Carrington *v.* Bents, 1 McLean 167; Segee *v.* Thomas, 3 Blatch. 11; Goodyear *v.* Bowen, 3 Blatch. 266.

The special appearance of a defendant for the purpose of making objection of the want of proper service might not have this effect; but if he appears in person or by counsel and moves to dismiss the bill for want of jurisdiction and also for want of equity, it is a waiver of want of jurisdiction of the person, on account of the defendant's non-residence in the district and want of service therein.[1] But this doctrine does not apply in case of infant defendants, whose appearance, personally or otherwise, would not be a waiver of want of proper service of process.[2]

§ 224. **Bills taken pro confesso; when defaults may be entered.**—The defendant is required to file his plea, demurrer or answer to the bill in the office of the clerk, on the rule day next succeeding that of entering his appearance, unless the time is otherwise enlarged by the judge of the court for cause shown upon motion for that purpose. In default thereof, the plaintiff may, at his election, enter an order, as of course, in the order book, that the bill be taken *pro confesso;* and thereupon the cause must be proceeded with *ex parte*, and the matter of the bill may be decreed by the court at the next ensuing term thereof accordingly, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, is entitled to process of attachment against the defendant to compel an answer, and the defendant cannot, when arrested upon such process, be discharged therefrom unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct as to pleading to or fully answering the bill within a period to be fixed by the court or judge, and undertaking to speed the cause.[3]

§ 225. **Decree on default.**—When a bill is taken *pro confesso*, the court may proceed to a decree at the next ensuing term, and such decree rendered must be deemed absolute, unless the court shall at the same term set aside the same, or enlarge the time for filing the answer, for cause shown, upon motion and affidavit of the defendant. But no such motion can be granted except upon payment of costs of the plaintiff in the suit up to that time, or such part thereof as the court may deem reasonable; and unless the defendant shall

[1] Jones *v.* Andrews, 10 Wall. 327.

[2] Lessee of Nelson *v.* Moon, 3 McLean 319. For form of entry of appearance, see *post*, Form No. 33; form of order, see *post*, Form No. 34.

[3] Equity Rule 18; Pendleton *v.* Evans, 4 Wash. 336.

undertake to file his answer within such time as the court may direct, and submit to such other terms as the court shall direct for the purpose of speeding the cause.[1]

The court cannot render a final decree for want of appearance at the first term after the service of a subpœna, unless another rule day has intervened; and if a decree *pro confesso* is irregularly entered it will be set aside on motion as a matter of course.[2]

§ 226. **Frame of bills; introductory part.**—The rules framed and promulgated by the Supreme Court for pleading, practice and procedure in the federal courts in equity prescribe to some extent the form and frame of bills and other pleadings, what they must contain, and what may be omitted in the frame of pleadings from the forms of pleadings in use in the High Court of Chancery in England.

Every bill in the introductory part thereof must contain the names, places of abode and citizenship of all the parties, plaintiffs and defendants, by and against whom the suit is brought. This may be in the following form:

"To the judges of the circuit court of the United States for the district of : A. B., of , and a citizen of the state of , brings this his bill against C. D., of , and a citizen of the state of , and E. F., of , and a citizen of the state of . And thereupon your orator complaining says that," etc.[3]

It is, however, quite common and convenient to preface this introduction to the bill with the following caption: "Circuit court of the United States for the district of , in the circuit."

§ 227. **What may be omitted from the bill.**—It is provided by rule that the plaintiff shall be at liberty to omit the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiffs; also what is commonly called the charging part of the bill, that is, the part usually setting forth the matters or excuses which the defendant will, it is supposed, set up by way of defence to the bill; also what is commonly called the jurisdiction

[1] Equity Rule 19.
[2] O'Hara *v.* MacConnell, 93 U. S. 150; Fellows *v.* Hall & Allen, 3 McLean 281.
[3] Equity Rule 20.

clause of the bill, that is, that part that sets forth that the acts complained of are contrary to equity, and that the defendant is without any remedy at law.

If these common averments of a bill in chancery are omitted, the bill will not be demurrable therefor. The complainant may also, in the narrative part of his bill, state and avoid by counter averments, at his option, any matter or thing which he supposes will be insisted upon by the defendants by way of defence to the case made by the plaintiff for relief.[1]

§ 228. **The prayer for relief of the bill.**—The prayer of the bill must ask for the special relief to which the plaintiff supposes himself entitled, and must also contain a prayer for general relief; and if an injunction or writ of *ne exeat regno*, or any other special order pending the suit, is required, it must be specifically asked for.[2]

The complainant's bill should give a general statement of the facts of the case, and it should contain sufficient matters of fact to maintain his case. The proofs must sustain the allegations; and a party will not be allowed to state one case in his bill or answer and make out a different one by his proof. The *allegata* and *probata* must agree.[3]

Under the general prayer for relief, other relief may be granted than that which is particularly prayed for; but it must be consistent with the case made by the bill.[4]

A bill in equity praying for a discovery and an account of profits on account of an infringement of a patent is not demurrable on the ground that the complainant has an adequate remedy at law.[5]

For various forms of bills, see *post*, No. 25, *et seq.*

§ 229. **Parties beyond the jurisdiction of the court.**—If other parties than those named as defendants in the bill appear to be necessary or proper parties thereto, the bill should aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to other parties. As to persons who are without the jurisdiction of the court, and may be properly made

[1] Equity Rule 21.

[2] Equity Rule 21.

[3] Harrison *v.* Nixon, 9 Pet. 483; Boon *v.* Chiles, 10 Pet. 177; Denham *v.* Railway Co., 1 Bond. (C. C.) 442.

[4] English *v.* Foxall, 2 Pet. 595; Walden *v.* Bodley, 14 Pet. 156; Hobson *v.* McArthur, 16 Pet. 182; Taylor *v.* Merchants' Fire Ins. Co., 9 How. 390; Wilson *v.* Graham, 4 Wash. 53.

[5] Perry *v.* Corning, 7 Blatch. 195.

parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction of the court.[1]

§ 230. **What the prayer for process of subpœna must contain.**—The prayer for process of subpœna must contain the names of all the defendants named in the introductory part of the bill. If any of them are infants under age, or otherwise under guardianship, it should state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction or writ of *ne exeat regno*, or any other special order pending the suit, is asked for in the prayer for relief, it is sufficient without repeating the same in the prayer for process.[2]

§ 231. **Signature of counsel.**—Bills in chancery should have the signature of counsel annexed to them; and this is considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the bill in the manner in which it is framed.[3] If the bill is not signed by counsel, it is demurrable; but signing on the back of it is sufficient, and if it is demurred to for this defect, it may be amended so as to obviate the objection made by the demurrer.[4]

§ 232. **Scandal and impertinence in bills.**—It is required that every bill should be expressed in as succinct terms as it reasonably can be, and that it contain no unnecessary recitals of deeds, documents, contracts or other instruments in *hec verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions thereto for this cause, be referred to a master by any judge of the court; and if so found by him to be scandalous or impertinent, the scandalous or impertinent matter may be expunged at the expense of the plaintiff, and he will be required to pay the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. But if the master reports that the bill is not scandalous or impertinent, the plaintiff is entitled to all costs occasioned by the reference.[5]

[1] Equity Rule 22.
[2] Equity Rule 23.
[3] Equity Rule 24.
[4] Dwight *v.* Humphrey, 3 McLean 104; Roach *v.* Hulings, 5 Cr. (C. C.) 637. If a demurrer to a bill shall be allowed, an amendment may be allowed in the discretion of the court, on such terms as may be deemed reasonable: Equity Rule 35.
[5] Equity Rule 26.

No general rule can be laid down as to what constitutes multifariousness, scandal or impertinence. Each case must be governed by the circumstances, in regard to which the court or examiner should exercise a sound discretion.[1]

§ 233. **No order of reference to a master, for scandal or impertinence, unless exceptions are taken in writing.**—No order can be made by any judge for referring any bill, answer or pleading, or other matter or proceeding depending before the court, for scandal or impertinence, unless exceptions are taken thereto in writing and signed by counsel, describing the particular passages that are considered to be scandalous or impertinent. Such exceptions must be filed on or before the next rule day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned unless the party obtaining it shall, without any unnecessary delay, procure the master to examine and report the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.[2]

§ 234. **Amendment of bills, when of course.**—The plaintiff is at liberty, as a matter of course and without payment of costs, to amend his bill in any respect, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point, which he may do of course, even after a copy has been taken out of the clerk's office, but before any answer or plea or demurrer to the bill, he must pay to the defendant the costs occasioned thereby, and must without delay furnish him a fair copy thereof, free of expense, with suitable references to the places where the amendments are to be inserted. And if the amendments are numerous he must furnish in like manner to the defendant a copy of the whole bill as amended; and if there be more than one defendant, a copy must be furnished to each defendant affected thereby.[3]

Under the privilege of amending a party is not at liberty to abandon the entire case made by the bill and make a new and dif-

[1] Gaines *v.* Chew, 2 How. 619; Oliver *v.* Platt, 3 How. 333; McLean *v.* Lafayette Bank, 3 McLean 415; Nourse *v.* Allen, 4 Blatch. 376.

[2] Equity Rule 27. Oliver *v.* Piatt, 3 How. 333; Nelson *v.* Hill, 5 How. 127.

[3] Equity Rule 28.

ferent case. Amendments are properly allowable when the bill is found defective in proper parties to it, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case; but not for putting in issue new matter to meet allegations of the answer. Amendments which change the character of the bill or answer so as to make substantially a new case should rarely if ever be admitted, especially after a cause has been set for a hearing.[1] If an amendment is made of course or on leave, as we shall hereafter notice, it should be by a separate bill, and not by interlineation of the original bill.[2] An amendment of the bill may be made by leave of the circuit court, after the removal of a cause from a state court, by inserting new counts for the same cause of action as that alleged in the original bill.[3]

§ 235. **Amendment of bill may be made after answer, plea or demurrer.**—The plaintiff may, even after an answer, plea or demurrer to his bill, but before replication, obtain an order from any judge of the court to amend his bill, upon motion or petition without notice on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof in his discretion may direct. If, however, a replication has been filed, the plaintiff will not be permitted to withdraw it and amend his bill, except upon a special order of a judge of the court, upon motion or petition after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.[4]

Under the provisions of the rule last cited, a bill may be amended after a hearing and case for relief made out, but not the case made by the bill. Thus, where the original bill was for a specific performance, but did not state the facts and circumstances on which the relief was based with sufficient fullness, and the amended bill embraced the subject-matter and general purpose of the original one,

[1] Shields *v.* Barrow, 17 How. 130; Walden *v.* Bodley, 14 Pet. 156; Holmes *v.* Trout, 1 McLean 1.

[2] Pierce & McDonald *v.* West, Ex'r, 3 Wash. 354.

[3] West *v.* Smith, 101 U. S. 263.

[4] Equity Rule 29.

and stated the contract, consideration, promise and acts of part performance with sufficient accuracy and precision, and the proof taken under the original bill entitled the complainants to the relief sought, it was held that the amendment after the hearing should be allowed.[1] But an amendment will not be allowed after replication, where the purpose of it is to bring in a new party who was known to the original plaintiff or his agent at the time the bill was filed.[2] Although the ruling on a demurrer to a bill may be erroneous, yet if the plaintiff amends his bill in conformity with the ruling, and the defendant answers the bill as amended, neither party can take advantage of the erroneous ruling.[3]

§ 236. **When amendments must be filed after order of allowance.**—If the plaintiff obtains an order to amend, as provided by the rule last cited, he should file his amendments or amended bill, as the case may require, in the office of the clerk, on or before the succeeding rule day. If he fails to do so he must be considered to have abandoned the same, and the cause will proceed as if no application for an amendment had been made.[4]

For form, see *post*, Form No. 41.

§ 237. **Demurrers and pleas; allowance of.**—No demurrer or plea is allowed to be filed to any bill unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay; and if it be a plea, that it is true in point of fact.[5]

If the demurrer or plea is not accompanied by the proper certificate of counsel and the required affidavit of the defendant, the proper practice would be to move to strike it from the files. If the plaintiff should file a demurrer to a plea, and the cause is regularly brought to argument on the question of the sufficiency of it, the want of the certificate and affidavit will be regarded as waived.[6]

For form of demurrer, see *post*, Nos. 42, 43, 44.

§ 238. **Demurrer; plea; answer.**—The defendant may at any time before the bill is taken for confessed, or afterwards with leave of the

[1] Neale *v.* Neale, 9 Wall. 1.

[2] Ross *v.* Carpenter, 6 McLean 382; Goodyear *v.* Bourn, 3 Blatch. 266.

[3] Marshall *v.* Vicksburg, 15 Wall. 146.

[4] Equity Rule 30.

[5] Equity Rule 31.

[6] Goodyear's Adm'rs *v.* Toby, 6 Blatch. 130. If a plea is filed irregularly, the complainant cannot treat it as a nullity and take a decree *pro confesso*. He should, before taking such a decree, obtain an order setting the plea aside or striking it from the files: Ewing *v.* Blight, 3 Wall. Jr. 134.

court, demur or plead to the whole bill, or to a part of it, and he may demur to part and plead to part of it, and answer to the residue. But if a bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying fraud and combination, and the facts on which the charge is founded.[1]

A defendant may meet a plaintiff's bill by several modes of defence. He may demur, plead or answer to the whole or to different parts of the bill. But a demurrer to the whole bill will not be sustained if any part of the bill is good and entitles the plaintiff to relief.[2]

Matters in abatement and relating to the jurisdiction of the court are preliminary in their nature, and must be taken advantage of by a plea, and cannot be by a general answer which admits the right and capacity of the plaintiff to sue.[3]

The office of a demurrer to a bill is to present the question of the right to maintain it, admitting all its allegations to be true. The court will not therefore examine, *aliunde*, what facts might or might not defeat it, for this is the office of an answer or plea.[4]

The office of a plea is to furnish some fact or facts not shown by the bill, but which, if stated therein, would have made the bill demurrable.

For forms of pleas and answers, see *post*, Nos. 47, 48.

§ 239. **Argument on demurrer or plea.**—The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon issue taken, the facts stated in a plea be determined for the defendant, they avail him so far as in law they ought to avail him.[5] If a bill in chancery avers that the defendant is a citizen of a state other than that of which the plaintiff is a citizen, the issue therein should be raised by a plea to the jurisdiction of the court.[6] The complainant should either demur to a plea and set it down for argument, in which case he admits the facts stated in the plea, but denies their legal sufficiency to prevent the relief claimed in the bill, or he should reply to the plea, denying the truth

[1] Equity Rule 32. But the confederacy clause may be omitted: Equity Rule 21.

[2] Livingstone *v.* Story, 9 Pet. 632; Heath *v.* Erie R. Co., 8 Blatch. 347.

[3] Livingstone *v.* Story, 1 Pet. 351.

[4] Ocean Ins. Co. *v.* Fields, 2 Story 59.

[5] Equity Rule 33.

[6] Wickliffe *v.* Owings, 17 How. 47.

of the statements of the same, or some of them, in which case he admits that if the controverted facts are true, then they are sufficient in law to bar a recovery. And if they are proved to be true, the bill should be dismissed.[1]

§ 240. **Costs where the demurrer or plea is overruled.**—If upon a hearing of a demurrer or plea it is overruled, the plaintiff is entitled to his costs up to that time, unless the court is satisfied that the defendant had good ground to interpose the same, and that it was not interposed vexatiously or for delay. Upon the overruling of a demurrer or plea, the defendant must be assigned to answer the bill, or so much thereof as is covered by the demurrer, the next succeeding rule day, or at such other period as, in the opinion of the court, it can be done consistently with justice and the rights of the defendant, in default of which the bill will be taken as confessed and the matter proceeded in and decreed accordingly.[2] If a decree *pro confesso* is taken before the time given for answer, it is, of course, irregular and may be set aside on motion.[3] If a demurrer to a bill is interposed by one of several defendants and overruled, and there is a failure of all the defendants to answer within the required time, the bill will be taken as confessed as to all of them.[4]

§ 241. **Amendment of a bill on allowance demurrer; costs.**—If the demurrer or plea is sustained, the court may allow the plaintiff to amend the bill upon such terms as it shall deem reasonable; but the defendant is entitled to his costs. The allowance of an amendment is in the discretion of the court, and an order refusing leave to amend is not subject to review in the Supreme Court.[5]

A demurrer or plea cannot be held bad and overruled upon argument merely because it does not cover so much of the bill as it might have done.[6] It may cover a part only of the bill, and the defendant may answer the balance.

§ 242. **Effect of failure to reply.**—If the plaintiff does not reply to any plea, or set down any plea or demurrer for argument on the rule day when the same is filed, or on the next rule day, he is deemed to admit the truth and sufficiency thereof, and his bill must

[1] Rhode Island *v.* Massachusetts, 14 Pet. 210.

[2] Equity Rule 34; Bank of U. S. *v.* White, 8 Pet. 262.

[3] Fellows *v.* Hull, 3 McLean 487.

[4] Suydam *v.* Beals, 4 McLean 12.

[5] Equity Rule 35; National Bank *v.* Carpenter, 101 U. S. 567; Hunt *v.* Louis, 2 Mason 342.

[6] Ferguson *v.* O'Harra, 1 Pet. (C. C.) 498; Equity Rules 36, 37.

be dismissed of course, unless the judge shall allow him further time for that purpose. A replication, as we have noticed, is an admission of the sufficiency of the plea, and all the defendant has to do is to prove it true.[1]

§ 243. **Effect of the answer as evidence.**—The general rule in chancery practice is that averments of the answer of the defendant uncontradicted on the trial are conclusive evidence in his favor;[2] and if it admits averments of the bill, but insists upon matters by way of avoidance of such facts, the plaintiff need not prove the facts admitted, and the burden is on the defendant to prove the matters in avoidance. So the general rule in chancery is that, if the facts charged in a bill as the ground for a decree are positively denied by the answer, the answer in this respect is equivalent to the adverse evidence of at least one witness; and if the averments of the bill which are thus denied are sustained by only one witness, the court would ordinarily be compelled to dismiss the bill. But if the averments thus contradicted are supported by one witness, corroborated by facts and circumstances established by the proof, it may be sufficient to outweigh the answer, unless the latter is also supported by other proof.[3]

The matters of the bill not denied by the answer, or admitted, are considered as true; but, as a general rule, the answer of one defendant cannot be used as evidence against his co-defendant; nor can the admissions in the answer of an agent be evidence against his principal; nor can the admissions of an agent, *in pais*, be evidence against his principal unless they were a part of the *res gesta*.[4] If, however, one defendant claims, as a defence, rights or interests derived from or through his co-defendant, the answer to the latter may be proper evidence against the former.[5]

The general rule above stated, relating to the answer as evidence, has been somewhat limited and modified by a general rule promulgated by the Supreme Court, as we shall hereafter notice.[6]

[1] Equity Rule 38; Hughes *v.* Blake, 6 Wh. 453; Poultney *v.* La Fayette, 3 How. 81.

[2] Lenox *v.* Pront, 3 Wh. 520; Clark *v.* White, 12 Pet. 178; Randall *v.* Phillips, 3 Mason 378.

[3] Union Bank *v.* Geary, 5 Pet. 98; Carpenter *v.* The Providence Ins. Co., 4 How. 185; Higbee *v.* Hopkins, 1 Wash. 230.

[4] Leeds *v.* Marine Ins. Co., 2 Wh. 380; Clark's Ex'r *v.* Van Reimsdyk, 9 Cr. 153.

[5] Field *v.* Holland, 6 Cr. 8; Osborne *v.* The President, Directors, etc., 9 Cr. 738.

[6] Amended Equity Rule 41, *post*.

§ 244. **Interrogating part of the bill; answer to.**—It is not essential to interrogate the defendant specially and particularly upon any statement of the bill, unless the complainant desires to do so to obtain a discovery. If, however, he inserts interrogatories in the interrogating part of it, they should be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.; and those interrogatories which each defendant is required to answer, where there are more than one, must be specified in a note at the foot of the bill to this effect: "The defendant, A. B., is required to answer the interrogatories numbered respectively 1, 2, 3," etc. "The defendant, C. D., is required to answer the interrogatories numbered respectively," etc.[1]

§ 245. **When the answer is not evidence.**—We have noticed the general rule in chancery in reference to the answer as evidence. But this has been restricted in certain cases by the rules of practice in equity prescribed by the Supreme Court. An amendment to Equity Rule No. 41 (December term, 1871) provides: "If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answers of the defendant, though under oath, except such parts thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause is set down for hearing on the bill and answer only; but may, nevertheless, be used as an affidavit with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in a cause." But this does not prevent the defendant from becoming a witness in his own behalf, under section 858 of the Revised Statutes, which provides that no witness shall be excluded in any civil action because he is a party or interested in the issue tried, except in certain cases.

§ 246. **Note at the foot of the bill treated as a part of the bill.**—By the provisions of the rule last referred to, the complainant may only require an answer under oath to certain interrogatories to be specified in a note at the foot of the bill. This note is considered and treated as a part of the bill, and any alteration in or addition to such note after the bill is filed will be considered and treated as an amendment of the bill.[2] The words preceding the interrogating part of

[1] Equity Rule 40, as amended, Dec. term, 1850, 10 How. 5; Equity Rule 41.

[2] Equity Rule 42.

a bill should be in the form or to the effect following: "To the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are respectively required to answer; that is to say—

"1. Whether, etc.

"2. Whether, etc."[1]

§ 247. **Interrogatories a defendant may decline to answer.**—A defendant may, by answer, decline answering any interrogatory, or part of an interrogatory, from the answering of which he might have protected himself by demurrer; and he is at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.[2]

§ 248. **Replication to answer.**—No special replication to any answer is allowed to be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may obtain leave to amend the same with or without the payment of costs, as the court or a judge thereof may in his discretion direct.[3] Special replications can no longer be used in chancery. If, from the nature of the answer, it becomes necessary to prove other matters than those contained in the bill, the proper practice would be to amend the bill in this respect, and insert the proper and necessary averment therein. Thus if a suit is brought in equity to restrain the use of a machine on the ground of an infringement of a patent thereon, and the defendant in his answer sets up a license therefor, the plaintiff cannot prove an abandonment of the license under a special replication, but should amend his bill and allege such abandonment.[4] So special facts in excuse for not bringing suit within the period prescribed by the Statute of Limitations should be set forth in the bill, such as coverture, minority or residence abroad. If these matters are omitted, the bill may be amended in this respect after answer, on leave of court, but they cannot be set up by special

[1] Equity Rule 43.
[2] Equity Rule 44.
[3] Equity Rule 45; Duponti *v.* Massy, 4 Wash. 128.
[4] Wilson *v.* Stolly, 4 McLean 275.

replication.[1] Although amendments of bills, after answer, cannot be made without leave of the court, objections to amendments without leave cannot be made for the first time in the appellate court.[2]

In case of an amendment of a bill after an answer filed, the defendant is required to put in a new or supplemental answer on or before the next succeeding rule day, which would be the first Monday of the next succeeding month after that on which the amendment or amended bill is filed, unless the time is extended or it is otherwise ordered by the court. And in case of the default of the defendant so to do, like proceedings may be had as in case of omission of a defendant to put in answer to an original bill.[3]

§ 249. **Parties to bills; absent parties.**—It is provided by Rule 47 in equity that "in all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent party."

If the cause can be fully and finally decided between the parties litigant without bringing in others who might also be made parties, and the latter cannot be reached by the process of the court, as where they cannot be served with process within the district, such parties may be dispensed with, and the cause be determined between the parties before the court.[4] Nor will the improper joinder of parties who are citizens of the same state affect the jurisdiction of the court if a decree may be properly entered as between the parties who are properly before the court.[5]

The general doctrine of chancery practice, however, is that all persons materially interested in the subject-matter of the suit ought to be made parties, either as plaintiffs or defendants; but this general rule is for the convenient and equitable administration of justice, and its application is more or less in the sound discretion of the court, and will usually be restricted to parties whose interests are

[1] Taylor *v.* Benham, 5 How. 233.
[2] Clements *v.* Moone, 6 Wall. 299.
[3] Equity Rule 46. For form of replication, see *post*, No. 52.
[4] Mallow *v.* Hinde, 12 Wh. 193; Vattier *v.* Hinde, 7 Pet. 252.
[5] Carneal *v.* Banks, 10 Wh. 181; Vattier *v.* Hinde, 7 Pet. 252.

in issue, and to be affected by the decree. And in all cases the decree will be so framed and modified as not to prejudice the interests of those not made parties to the suit, or properly served with original process.[1] A court of equity should aim to do complete justice by embracing the whole subject, and deciding upon and settling the rights of all persons interested in the subject of the suit, in order to prevent future litigation;[2] and if the rights of an absent party must necessarily be affected and prejudiced by a decree, it should not be rendered, and objection to such a decree can be taken not only upon the hearing but in the appellate court.[3] Where real property, after being mortgaged, was conveyed in trust for the benefit of children, including those in being and those that might be born, and a bill was brought to foreclose the mortgage, it was held that all the children *in esse* at the time of filing the bill were indispensable parties to bar a right of redemption, and that a decree against the trustee would not bind the *cestui que trusts*.[4] So part owners or tenants in common of real property have an interest in the subject-matter of a suit to partition the same, and each one is so intimately connected with his co-tenant that if they cannot all be subjected to the jurisdiction of the court, the bill should be dismissed.[5]

But a court of equity of the United States will not suffer its jurisdiction to be ousted because of the non-joinder of merely formal parties who are not entitled to sue or liable to be sued in its courts.[6] Where four parties had a dispute about their respective rights and interests in the stock of a railroad company, and entered into a contract of settlement by which the stock was to be divided in certain proportions between them, but one of the parties thereto refused to carry out the agreement, and another party filed a bill to compel him to stand by the agreement and to carry it into execution, to which the former answered, objecting that the other parties to the contract of settlement should have been made parties to the bill, it

[1] Mechanics' Bank *v.* Setons, 1 Pet. 299.

[2] Caldwell *v.* Taggart, 4 Pet. 190; Marshal *v.* Beverly, 5 Wh. 313; Banks *v.* Carrolton Railroad, 11 Wall. 624.

[3] Coiron *v.* Mellandon, 19 How. 113; Joy *v.* Wirtz, 1 Wash. 517.

[4] Clark *v.* Reyburn, 8 Wal. 318. See also Ribon *v.* Railroad Co., 16 Wall. 446.

[5] Barney *v.* The City of Baltimore, 6 Wall. 280; Traders' Bank *v.* Campbell, 14 Wall. 87. See also Hoxie *v.* Carr, 1 Sum. 173; Marshall *v.* Beverly, 5 Wh. 313.

[6] Wormley *v.* Wormley, 8 Wh. 421; *ante*, § 125, *et seq.*

was held that, as no relief was asked of the other parties, they were not necessary parties to the bill.[1] So where a person filed a bill as administrator of a deceased partner, to have an account of the partnership concerns, and alleged in his bill that he was the sole heir of the deceased partner, it was held that the fact that he was not so could not affect the case, and that the bill was not objectionable for the want of necessary parties, as a decree in the case in his favor would not affect the rights of heirs who might claim a distribution of the money which might be decreed the complainant.[2]

§ 250. **When parties are numerous.**—Although it is a general rule in equity that all persons interested in the subject-matter of the suit should be made parties, to this there is an exception, as where the parties are so numerous as to make it impracticable, in which case a few, representing the interests of the many, are sufficient.[3] This exception is also embraced in the forty-eighth rule of practice prescribed by the Supreme Court for the courts of equity of the United States. It provides as follows: "Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making them all parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties."[4]

And, as we have seen, proper but not necessary parties to a bill may be omitted or not served with process; as where they cannot be made parties without ousting the court of jurisdiction.[5]

§ 251. **Trustees represent parties beneficially interested; executors and administrators.**—In all suits concerning real estate which is vested in trustees by devise, if they have, by virtue of the devise, power to sell and give discharges for the proceeds, and charge of the rents and profits of the estate, they may properly represent, as

[1] French *v.* Shoemaker, 14 Wall. 314.

[2] Moore *v.* Huntington, 17 Wall. 417.

[3] Mandeville *v.* Riggs, 2 Pet. 482.

[4] West *v.* Randall, 2 Mason 181.

[5] Milligan *v.* Millege, 3 Cr. 220; Simms *v.* Guthrie, 9 Cr. 20; Kerr *v.* Watts, 6 Wh. 550; Potter *v.* Gardner, 12 Wh. 498; Hook *v.* Payne, 14 Wall. 252; *ante*, § 125, *et seq.*

parties to a bill, the persons beneficially interested in the estate or the rents and profits thereof, in the same manner and to the same extent as executors and administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it is not necessary to make the persons beneficially interested in such real estate, or the rents and profits thereof, parties to the suit. But the court may, upon consideration of the matter on the hearing, order such persons or any of them to be made parties.[1]

§ 252. **When an heir-at-law is not a necessary party; joint and several debtors.**—It is not necessary to make the heirs-at-law parties in suits brought to compel the execution of the trusts of a will, but the plaintiff is at liberty to do so where he desires to have the will established against them.[2]

And if the plaintiff has a joint and several demand against several persons either as principals or sureties, it is not necessary to bring before the court all the persons liable on the contract or other demand, but he may proceed against one or more of them severally liable.[3]

§ 253. **Defect of parties suggested in the answer; practice.**—If the complainant omits to bring before the court persons who are necessary parties, and the defect does not appear on the face of the bill, the proper practice would be to set forth the defect by a plea or answer. If it is patent on the face of the bill, however, it could be taken advantage of by demurrer.[4] If it is suggested in the answer that there is a defect of parties to the bill, the plaintiff is at liberty to set the cause for hearing on that objection only; but it is necessary for him to state, in the entry of the hearing in the clerk's order-book, the purpose for which the same is set down, to the following effect, that is to say: "Set down upon the defendant's objection for want of parties." If he shall not so set down the cause for defect of parties, he will not, as of course, be allowed to amend his bill in this respect on the hearing of the cause.[5]

But if on a final hearing a bill is dismissed on the ground of a defect of parties, it should be without prejudice, as the complainant ought to be permitted to file a bill against all the proper and neces-

[1] Equity Rule 49; Potter *v.* Gardner, 12 Wh. 498.
[2] Equity Rule 50.
[3] Equity Rule 51.
[4] Story *v.* Livingstone, 13 Pet. 359.
[5] Equity Rule 52.

sary parties at any time afterwards.[1] If, however, no objection is made to the bill for the want of necessary parties, either by demurrer, plea or answer, the court is at liberty, on the hearing of a cause, and on objection being made by the defendant on this ground, to proceed to a decree saving the rights of the absent parties.[2] But, if a decree cannot be rendered without manifest prejudice to the rights of those who should have been made parties, no decree should be entered, although no objection is made on that ground.[3]

§ 254. **Nominal parties need not appear.**—The parties served with a subpœna need not appear and answer a bill, where no account, payment, conveyance or other direct relief is sought against them, unless the plaintiff specially requires them to do so by the prayer of his bill. But they may appear and answer at their option. In case, however, they do not appear and answer, they will be bound by all the proceedings in the cause; and if the plaintiff shall require them to appear and answer, they are entitled to all the costs of the proceedings against them, unless the court shall otherwise direct.[4] The omission, as we have seen, of merely formal parties will not oust the jurisdiction of the court. If complete relief can be given in a cause to those who seek it, without affecting the interests of others not made parties, a decree for relief will be granted.[5]

§ 255. **Injunctions; when granted of course.**—If an injunction is asked for in the bill to stay proceedings at law, and the defendant does not enter his appearance and plead, demur or answer to the same within the time prescribed therefor by the rules of practice in equity, the plaintiff is entitled as of course to such injunction, upon motion and without notice. Special injunctions are grantable only on due notice to the adverse party, by the court in term time or by a judge thereof in vacation, after a hearing. But the hearing may be *ex parte*, if the adverse party does not appear at the time and place designated in the notice. And in case an injunction is awarded in vacation, it will, unless previously dissolved by the judge granting the same, continue until the next term of the court

[1] Kendig *v.* Dean, 97 U. S. 423; Barney *v.* Baltimore City, 6 Wall. 280; Home *v.* Mullen, 22 Wall. 42.

[2] Equity Rule 53.

[3] Wallace *v.* Holmes, 9 Blatch. 65; Mechanics' Bank *v.* Setons, 1 Pet. 299; Legee *v.* Thomas, 3 Blatch. 11; Story *v.* Livingstone, 13 Pet. 359.

[4] Equity Rule 54.

[5] Joy *v.* Wirtz, 1 Wash. 517; Wormley *v.* Wormley, 8 Wh. 421; Mechanics' Bank *v.* Setons, 1 Pet. 299. See also Young *v.* Pott, 4 Wash. 521.

or until dissolved by some other order of the court.[1] Unless other parties than those in the suit at law are made parties to the bill to enjoin, and different interests are involved, a bill to enjoin a judgment at law is not treated as an original bill; but if the bill makes others parties, having different interests, it is considered an original bill.[2] For form of order for injunction, see *post*, No. 70; form of injunction, see No. 255.

§ 256. **Bills of revivor and supplemental bills; abatement.**—On general principles a suit is abated on the death of either party, but it is provided by Rule 56 for the equity courts of the United States that "whenever a suit shall become abated by the death of either party, or by any other event, it may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require." The bill should be filed by the proper parties entitled to revive the suit, and may be filed in the office of the clerk at any time; and upon the suggestion of the facts the process of subpœna should be issued as a matter of course by the clerk, requiring the proper representatives of the other party to appear and show cause, if any, why the cause should not be revived. If at the next rule day occurring after fourteen days from the service of said process of subpœna, that is to say, the first Monday of the month after fourteen days from the service of the same, no cause shall be shown, the suit will stand revived as of course.[3]

In such a case the practice is to allow on the final hearing, the use of any testimony taken before the abatement, and which might have been used if no abatement had occurred. The suit, after revival, proceeds in the new form, unaffected by the change.[4] But it seems a bill of revivor cannot be entertained where the original jurisdiction depended upon the proper citizenship of the parties, and the controversy which it seeks to revive will be between citizens of the same state, although there was the requisite citizenship of the original parties; as where a bill of revivor is brought by an administrator who is a citizen of the same state with the defendant.[5]

For forms in such cases, see *post*, No. 38, *et seq.*

[1] Equity Rule 55.

[2] Simms *v.* Guthrie, 9 Cr. 19; Dunn *v.* Clark, 8 Pet. 1. See also Marsh *v.* Bennett, 5 McLean 117; Worcester *v.* Truman & Smith, 1 Id. 483.

[3] Equity Rule 56; Equity Rule 2.

[4] Vattier *v.* Hinde, 7 Pet. 252.

[5] Clarke *v.* Mathews, 2 Sum. 262.

§ 257. **When supplementary bills are proper.**—If a suit in equity becomes defective by some event occurring after the filing of the bill, as, for instance, by the change of interest of parties in the matter in controversy, or for any other reason, a supplemental bill or a bill in the nature of a supplemental bill may be necessary. Leave to file the same may be granted by any judge of the court on any rule day, upon any proper cause shown and on due notice to the other party. If leave is granted, the defendant must demur, plead or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time is assigned by a judge of the court.[1] But it is not necessary, in any bill of revivor or supplemental bill, to set forth any of the statements of the original bill, unless the special circumstances of the case may require it.[2]

§ 258. **Answers and amendments thereof.**—We have remarked that the rules in equity require an appearance of the defendant, in person or by attorney, on the next rule day, that is, the first Monday of the next succeeding month, if the defendant has been served with process twenty days before that time; if not, then at the next succeeding rule day. And he is required to file his plea, answer or demurrer to the bill on the next succeeding rule day after entering his appearance, unless the court shall, for cause shown, extend the time. In default of which the plaintiff may enter an order, as of course, in the order book, that the bill be taken *pro confesso*.[3] And unless there is a waiver of answer under oath, the defendant must verify it. This may be done before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a state or territory.[4]

An answer may be amended of course, in any matter of form, or by filling up a blank, or correcting a date, or by reference to a document or other small matter, at any time before a replication is put in, or the cause is set down for a hearing upon the bill and answer; but the defendant should reverify it unless there is a waiver of the same. After a replication or such setting down for a hearing, it

[1] Equity Rule 57; Kennedy *v.* Georgia State Bank, 8 How. 610; Jenkins *v.* Eldredge, 3 Story 299; Parkhurst *v.* Kinsman, 2 Blatch. 72.

[2] Equity Rule 58.

[3] See *ante*, § 225.

[4] Equity Rule 59. In case of answer of a defendant beyond the seas: Read *v.* Consequa, 4 Wh. 335; Herman *v.* Herman, 4 Wash. 555.

cannot be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court or a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported if required by affidavit. If granted, the court or judge granting the same may require it to be separately engrossed as an amendment to the original answer, so as to be distinguishable therefrom.[1]

Leave to amend an answer after replication, or the cause is set down for a hearing, will not ordinarily be granted where the matter set up in the amended answer constitutes a new defence, and especially where it appears that the matters thus set up could with reasonable diligence have been introduced into the original answer.[2] For forms of answers and amended answers, see *post*, No. 48, *et seq.*

§ 259. **Answer; exceptions thereto.**—If an answer is filed on any rule day, the plaintiff is allowed until the next succeeding rule day to file exceptions thereto for insufficiency, unless a longer time shall be allowed for that purpose upon cause shown to the court or a judge thereof; and if no exception is filed thereto within that time, the answer will be taken to be sufficient.[3]

If exceptions are taken on the ground that certain allegations of the bill are neither answered, admitted nor denied, it is necessary to inquire whether the facts charged in the allegations are material and might contribute to establish the equity of the bill. If they do not, the exceptions should be overruled.[4] If an exception to an answer is taken on the ground of insufficiency, it should state the charges in the bill, the interrogatories applicable thereto to which the answer is responsive, and the language of the answer, so that the court may determine whether it is sufficient or not; and any exception is considered as waived by going to trial on the merits.[5] For forms of exceptions, see *post*, No. 49.

§ 260. **When exceptions will be set down for a hearing; answer after allowance.**—If exceptions are filed to an answer for insufficiency, within the time prescribed by the rules of practice in equity, and the defendant does not submit to the same and file an

[1] Equity Rule 60.

[2] India Rubber Co. *v.* Phelps, 8 Blatch. 85; Grier *v.* Gregg & Wald, 4 McLean 202; Walden *v.* Bodley, 14 Pet. 156.

[3] Equity Rule 61.

[4] Hardeman *v.* Harris, 7 How. 726.

[5] Brooks *v.* Byam, 1 Story 296; Kitridge *v.* Race, 92 U. S. 116. See as to construction of pleadings, Brown *v.* Pierce, 7 Wall. 205.

amended answer on the next succeeding rule day, the defendant may forthwith set them down for a hearing on the next succeeding rule day thereafter before the court, and may enter as of course, in the order book, an order for that purpose. If he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer must be deemed sufficient; provided, however, that the court or any judge thereof may, for good cause shown, enlarge the time of filing exceptions or for answering the same upon such terms as may be deemed reasonable.[1] If the exceptions are allowed, it is the duty of the defendant to put in a full and complete answer on the next succeeding rule day, otherwise the bill may be taken as confessed so far as the matter referred to in the exceptions is concerned; or the plaintiff at his election may have a writ of attachment to compel the defendant to make a better answer to the matter of such exceptions, from which he will not be discharged except by putting in such answer, and complying with such other terms as the court or a judge may direct.[2] And if the exceptions shall be overruled, or the answer shall be adjudged insufficient, the prevailing party is entitled to the costs occasioned thereby, unless otherwise directed by the court or a judge thereof at the time of the hearing of the exceptions.[3] For form of exceptions, see *post*, No. 49.

§ 261. **Replication and issue.**—If the answer shall not be excepted to, or shall be adjudged sufficient, the plaintiff is required to file the general replication thereto on or before the next succeeding rule day thereafter, when the cause will be deemed at issue without further pleading on either side. But if the plaintiff omits to file a replication within the time prescribed, the defendant is entitled to an order, as of course, for the dismissal of the suit, unless the court or a judge thereof shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, and the plaintiff submit to such other terms as may be directed. If no replication is filed, the answer is taken as true, and no evidence will be allowed to contradict it.[4] On failure to put in a general replication to an answer, the order of dismissal may be entered by the clerk of course, without any application to the court or a judge.[5]

[1] Equity Rule 63.
[2] Equity Rule 64.
[3] Equity Rule 65.
[4] Pierce *v.* West, 1 Pet. (C. C.) 351; Coleman *v.* Martin, 6 Blatch. 291; Equity Rule 66.
[5] Robinson *v.* Satterlee, 3 Saw. 134.

The rule last cited provides that the court or a judge thereof may upon motion, and for cause shown, allow a replication to be filed. Where a bill was dismissed, but before the final decree was entered the plaintiff by motion asked leave to file a general replication and to take testimony, and offered to pay the accrued costs, but made no suggestion of mistake or inadvertence, it was held that the motion must be denied.[1] For form of replication, see *post*, No. 52.

§ 262. **Depositions; commissions and commissioners.**—When the cause is at issue, commissions to take testimony upon interrogatories may jointly or severally be taken out by the parties. If either party desires so to do, he is required to file the interrogatories in the clerk's office, and give ten days notice to the opposite party to file cross interrogatories, before the issuing of the commission. If no interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. The commissioner may be designated by the court or a judge thereof, or the court or a judge thereof may vest in the clerk power to name commissioners to take testimony. Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all witnesses to be examined shall be examined orally before one of the examiners of the court, or before an examiner specially appointed by the court. The examiner must in such a case be furnished with a copy of the bill and answer, if any, and the parties must have an opportunity to be present on such examination, personally or by their counsel or solicitors, and the witnesses are subject to cross-examination and re-examination. The evidence must be taken down by the examiner, in writing, in a narrative form, unless the examiner determines that it shall be by questions and answers in special instances. When completed the depositions must be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend. But if the witness shall refuse to sign the deposition, the examiner may sign the same, and he may state any such special matters to the court as he shall think fit. Any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he cannot decide on the competency, materiality or relevancy of such questions. The court has power to deal with the costs of incompetent, immaterial or irrelevant depositions, or parts of them, as may

[1] Ballenger *v.* Mackey, 14 Blatch. 355.

be just. The examiner has the same power to coerce the attendance of witnesses as in case of examination on written interrogatories.

The examiner in such cases may require reasonable notice to be given of the time and place of examination of witnesses to the opposite party; and when the same is concluded, the deposition, duly authenticated, should be transmitted by him to the clerk of the court, and be filed by him.

Testimony, however, may be taken by commission on written interrogatories and cross interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge. If the evidence in a cause is to be taken orally, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of his bill, and a time thereafter within which the defendant must take his evidence in defence, and a time thereafter in which the complainant must take his evidence in reply; and no further evidence can be taken in the cause unless by agreement of the parties or by leave of court first obtained on motion for cause shown. Parties may also agree to take testimony orally.[1]

For forms in such cases, see *post*, Nos. 80, 81; and Commissioners' Forms.

§ 263. **Three months allowed after the cause is at issue for the taking of testimony.**—It is provided by a rule in equity that three months and no more shall be allowed for the taking of testimony after the cause is at issue, unless a court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period can be read in evidence at the hearing except as aforesaid.[2]

This rule applies to the testimony of both parties; and the question whether the time should be enlarged is largely in the sound discretion of the court, and unless there should be a clear abuse of this discretion, the Supreme Court would not interfere.[3]

§ 264. **Testimony de bene esse; notice; form of the last interrogatory.**—If after any bill is filed, and before the defendant has answered the same, an affidavit is made and filed in the office of the clerk of

[1] Equity Rule 67. Each interrogatory should be answered fully: Ketland *v.* Bissett, 1 Wash. 144; Bell *v.* Davidson, 3 Wash. 328. They should be at least substantially answered: Dodge *v.* Israel, 4 Wash. 323; Richardson *v.* Golden, 3 Wash. 109; Rhoades *v.* Selin, 4 Wash. 715.

[2] Equity Rule 69.

[3] Ingle *v.* Jones, 9 Wall. 486.

the court, stating that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk is required to issue, as a matter of course, a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon due notice to the adverse party of the time and place of taking his or their testimony.

The last interrogatory must be in substance as follows: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."[1]

§ 265. **Defendant must answer the original bill before the plaintiff is required to answer the cross-bill.**—If a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, he must answer the original bill before the plaintiff is required to answer the cross-bill.[2] The answer in such a case to the cross-bill may be used at the hearing by the party filing the same in the same manner and under the same restrictions as an answer to an original bill may be read and used. A cross-bill depends upon the original one, and may be said to be a mere auxiliary suit. If its purposes are entirely different from those of the original bill, it cannot properly be considered a cross-bill, although the matters therein may have some relation to the same general subject. Nor can new parties be brought into a cause by a cross-bill.[3]

If a bill is filed to set aside an agreement or conveyance, and the defendant desires to have it established by a decree of the court, he may do so by filing a cross-bill for that purpose.[4] But a cross-bill cannot be properly filed without leave of court, and if so filed it will be set aside or dismissed.[5]

§ 266. **Appointment of masters and their compensation.**—The circuit courts have power to appoint standing masters in chancery in their respective districts, both the judges concurring therein,

[1] Equity Rules 70, 71. See also Richardson *v.* Golden, 3 Wash. (C. C.) 109; Dodge *v.* Israel, 4 Id. 323; Rhoades *v.* Selin, Id. 715.

[2] Equity Rule 72; Allen *v.* Allen, Hemp. 58; Young *v.* Pott, 4 Wash. 521.

[3] Shields *v.* Barrow, 17 How. 130; Cross *v.* De Valle, 1 Wall. 1.

[4] Carnocan *v.* Christie, 11 Wh. 646.

[5] Bronson *v.* La Crosse & M. R. Co., 2 Wall. 283.

and they may appoint a master *pro hac vice*, in any particular case. But no clerk of the district or circuit court or his deputy can be appointed either as receiver or master in any case, except where the judge shall determine that special reasons exist therefor, to be assigned in the order of appointment. The compensation to be allowed the master is to be fixed by the court in each particular case, and such compensation must be charged upon and borne by such of the parties in the cause as the court shall direct. He cannot, however, retain the report as security for his compensation, but where it is allowed he is entitled to an attachment against the party who is ordered to pay the same, if upon notice thereof he does not pay it within the time prescribed by the court.[1]

§ 267. **Reference and proceedings before masters.**—It is not the practice in all cases for courts of equity to refer causes to a jury or master, to ascertain the facts, but they may do so themselves, or refer them to a jury or a master.

If, however, the bill calls for an account, and this is complex and intricate, it should be referred to a commissioner or master, to be examined and reported by him. This reference can only be made after an interlocutory decree, on the general merits of the plaintiff's bill. The master may take evidence upon written interrogatories, or *viva voce*, the parties to the suit being present personally or by counsel, or having due notice thereof, and an opportunity to appear before him.[2]

Exceptions to the report of a master may be taken by either party. The errors should be specifically pointed out, as the parts not excepted to will be considered as correct and admitted.[3]

It is the duty of the master, upon every reference to him, within a reasonable time to assign a time and place for proceedings on the same, and to give due notice thereof to each of the parties or their solicitors; and if either party fails to appear at the time and place appointed, he may proceed *ex parte*, or in his discretion adjourn the examination and proceedings to a future day, giving the absent party or his solicitor due notice thereof. It is the duty of the master to proceed with all reasonable diligence in every reference to

[1] Equity Rule 82; act of Congress, 1879, ch. 183, p. 415.

[2] Field *v.* Holland, 6 Cr. 8; Story *v.* Livingston, 13 Pet. 359. If the bill for the balance of an account is taken *pro confesso*, the account must be referred to a master: Pendleton *v.* Evans' Ex'r, 4 Wash. 391; Equity Rule 77.

[3] Dubourg *v.* United States, 7 Pet. 625.

him, and with the least practicable delay; and either party may apply to the court, or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reasons for any delay.[1] It is the duty of the party procuring a reference to cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference is made; and if he fail to do so, the adverse party is at liberty forthwith to cause proceedings to be had before the master at the costs of the other party.[2] The report should not contain any state of facts, charge, affidavit, deposition, examination or answer, or any part thereof, brought in or used before the master, but they should be referred to and identified so as to enable the court to determine what was brought in or used.[3] The court will not investigate the items of an account, nor review the whole testimony taken before a master.[4] Exceptions should be filed pointing out the particular portion of the testimony on which the party excepting relies.

For forms in such cases, see *post*, Nos. 56, 57, 78.

§ 268. **Hearing before a master; evidence.**—The master has full authority to examine the parties in a cause upon oath touching all matters contained in the reference; and he has authority to require the production of all books, papers, writings, vouchers and other documents relating thereto. He may also examine on oath, *viva voce*, all witnesses produced by the parties before him, and order the examination of other witnesses to be taken, under a commission issued upon his certificate, from the clerk's office, or otherwise as provided by acts of Congress or by the rules in equity; and may direct the mode in which the matters requiring evidence shall be proved before him, and do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits of the case and the rights of the parties.[5]

§ 269. **How witnesses are procured.**—Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by a subpœna in the usual form, which may be issued by the clerk of

[1] Equity Rule 75.
[2] Equity Rule 74.
[3] Equity Rule 76.
arding *v.* Handy, 11 Wh. 103.
[5] Equity Rule 77; Harding *v.* Handy, 11 Wh. 103; Story *v.* Livingston, 13 Pet. 359.

the court, in blank, and filled up by the party praying for the same, or the commissioner, master or examiner, requiring the attendance of the witness at the time and place specified; and he is allowed for his attendance the same fees as for attendance in court. If he refuses to appear after due service of the subpœna, he is guilty of a contempt of court, which being certified to the clerk's office by the commissioner, master or examiner, an attachment may issue for a contempt on the order of the court or a judge thereof, in the same manner as for failure to attend, or for refusing to testify in court.[1] When a witness has been once examined, and his deposition used on the hearing, he cannot be re-examined before the master without a special order of the court; and if leave is thus granted, he can, usually, only be examined in respect to facts not before testified to by him, and not then in issue.[2] But the court may in its discretion, if it is deemed advisable, allow the examination of witnesses *viva voce*, in any case, in open court.[3]

§ 270. **How accounts must be brought in; examination of party.**—All parties accounting before a master must bring in their respective accounts in the form of debtor and creditor, and any of the other parties not satisfied therewith may examine the accounting party *viva voce*, or upon interrogatories in the master's office, or by deposition, as the master may direct.[4] And all affidavits, depositions and documents which have been previously made, read or used in the court upon any proceeding in any cause or matter may be used before the master. So the master may examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, and the testimony must be taken down, if either party requires it, for use in court.[5]

§ 271. **Exceptions to the report of a master; when filed.**—Exceptions may be taken to the rulings of a master in chancery, but they should be taken at the time and entered in his minutes.[6] When the master's report is completed it is his duty to return the same into the clerk's office, and of the clerk to make an entry of the day of the return in the order-book. After that is done the parties have one month in which to file exceptions to the same. If no exceptions are filed by either party within that time, the report will stand

[1] Equity Rule 78.
[2] Gass *v.* Stinson, 2 Sum. 605; Jenkins *v.* Eldridge, 3 Story 299.
[3] Equity Rule 78.
[4] Equity Rule 79.
[5] Equity Rule 80.
[6] Troy Iron and Nail Factory *v.* Corning, 6 Blatch. 328; Oliver *v.* Platt, 3 How. 333; Harding *v.* Handy, 111 Wh. 103.

confirmed on the next rule day after the month is expired. But if they are filed, they will stand for a hearing before the court if then in session; if not in session, then at the next sitting which shall be held thereafter.[1] In making exceptions a general assignment of errors is insufficient, but they should state article by article the parts of the report to which exception is taken.[2]

An exception to a master's report is not in the nature of a special demurrer, nor is it required to be so full and specific; but it should distinctly point out the finding and conclusions of the master which it seeks to set aside.[3] If a master or referee has followed the order and judgment of the court on the reference, no objection can be taken on appeal from the final judgment of the court on account of error in the original or interlocutory judgment by which the reference was made and the specific directions given.[4]

Costs on exceptions are regulated by rule as follows: the party whose exceptions are overruled must, for the overruled exceptions, pay costs to the other party, and for those sustained or allowed he is entitled to costs, the costs in each case to be fixed by the court, by a standing rule of the circuit court.[5]

§ 272. **Decrees; clerical mistakes may be corrected; what decrees should contain.**—It is provided by rule that any clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the enrollment thereof, be corrected by order of the court or a judge thereof upon petition, without the form or expense of a rehearing.[6]

The practice in England is to recite in the decree the substance of the bill and answer and other pleadings, and the facts on which the court founds its decree. But in this country the pleadings and decree are a part of the record; and by a rule of court in equity, neither the bill, answer nor other pleadings should be recited or stated in the decree or order.[7] They should begin as follows: "This cause came on to be heard (or to be further heard as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:"

[1] Equity Rule 83.
[2] Dexter *v.* Arnold, 2 Sum. 108; Story *v.* Livingston, 13 Pet. 359; Green *v.* Bishop, 1 Cliff. 186.
[3] Foster *v.* Goddard, 1 Black 506.
[4] N. Orleans *v.* Gaines, 15 Wall. 624.
[5] 7 Equity Rule 84.
[6] 6 Equity Rule 85.
[7] Whiting *v.* Bank of U. S., 13 Pet. 6; Equity Rule 86.

[Here insert the decree or order.]

For forms of decrees, see *post* ("Forms in Equity"), No. 87, *et seq.*

§ 273. **Guardians and prochein amis, appointment of.**—The law supposes infants to be incapable of understanding and managing their affairs, and the duty of watching their interests devolves to a considerable extent upon courts both of law and equity. They defend by guardian, who is usually the nearest relation not interested in the matter in question or controversy.[1] It is provided by a rule in equity as follows: "Guardians ad litem to defend a suit may be appointed by the court, or any judge thereof, for infants or other persons who are under guardianship or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*, subject, however, to such orders as the court may direct for the protection of infants and other persons."[2]

§ 274. **Rehearing; what the petition for should contain.**—A rehearing is only allowed where some plain omission or mistake has been made, or where something material to the decree has been brought to the notice of the court, which had been overlooked.[3] The rule in equity on this subject provides: "Every petition for a rehearing shall contain special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, and shall be verified by the oath of the party or some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court."[4] The petition must usually state some reason for the rehearing which would be good ground for a new trial at common law.[5] If the ground for the rehearing is newly-discovered evidence, it should appear that it was unknown at the trial and could not with due diligence have been discovered.[6] But a new trial will not be granted on the mere certificate of counsel that there is sufficient cause for it.[7]

[1] Bank of U. S. *v.* Ritchie, 8 Pet. 128.

[2] Equity Rule 87.

[3] Jenkins *v.* Eldridge, 3 Story 299.

[4] Equity Rule 88.

[5] Hunter *v.* Marlboro', 2 Woodb. & M. 168.

[6] Bentley *v.* Phelps, 3 Wood. & M. 403.

[7] Emerson *v.* Davis, 1 Woodb. & M. 21; Tufts *v.* Tufts, 3 Id. 426.

§ 275. **Rules may be made by the circuit courts.**—We have observed that the Supreme Court has, by virtue of the statute conferring that power, prescribed certain rules for the circuit courts, both at law and in equity; and that court has, by rule, conferred authority upon the circuit courts to make other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules prescribed by the Supreme Court, provided both judges concur therein. They may also alter and amend such rules.[1] The power thus conferred gives the circuit courts the right to prescribe the time and manner of appearing and answering, the mode of conducting trials, the order of introducing evidence and the times when it must be introduced; but these rules may be waived or modified by the circuit court so as to prevent them from working injustice, and they must not be inconsistent with the general rules of practice prescribed by the Supreme Court.[2]

§ 276. **Decrees in cases of foreclosure.**—It is further provided by a general rule of the Supreme Court that in suits in equity for the foreclosure of mortgages in the circuit courts, or in any court of the territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due the complainant over and above the proceeds of the sale or sales, and that execution may issue for the collection of the same, in the same manner as where the decree is solely for the payment of money.[3]

[1] Equity Rule 89.

[2] Poultney *v.* La Fayette, 12 Pet. 472; Philadelphia and Trenton R. Co. *v.* Stimpson, 14 Id. 448; Bank of U. S. *v.* White, 8 Id. 262; Russell *v.* McLellan, 3 Woodb. & M. 157.

[3] Equity Rule 92.

CHAPTER XI.

SUPREME COURT—ORGANIZATION AND SESSIONS.

§ 277. **Provisions for the organization of the Supreme Court.**—The provisions of the Revised Statutes relating to the organization of the Supreme Court are as follows:

CONSTITUTION OF.—*Sec.* 673. The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.

PRECEDENCE OF JUSTICES.—*Sec.* 674. The associate justices shall have precedence according to the dates of their commissions, or when the commissions of two or more of them bear the same date, according to their ages.

VACANCY IN THE OFFICE OF CHIEF JUSTICE.—*Sec.* 675. In case of a vacancy in the office of Chief Justice, or of his inability to perform the duties and powers of his office, they shall devolve upon the associate justice who is first in precedence, until such disability is removed, or another Chief Justice is appointed and duly qualified. This provision shall apply to every associate justice who succeeds to the office of Chief Justice.

SALARY OF JUDGES.—*Sec.* 676. The Chief Justice of the Supreme Court of the United States shall receive the sum of ten thousand five hundred dollars a year, and the justices thereof shall receive the sum of ten thousand dollars a year each, to be paid monthly.

APPOINTMENT OF CLERK, MARSHAL AND REPORTER.—*Sec.* 677. The Supreme Court shall have power to appoint a clerk and a marshal of said court, and a reporter of its decisions.

APPOINTMENT OF DEPUTY CLERK.—*Sec.* 678. One or more deputies of the clerk of the Supreme Court may be appointed by the court on the application of the clerk, and he may be removed at the pleasure of the court. In case of the death of the clerk his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk in his name until a clerk is appointed and qualified; and for the defaults and misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk, and his estate, and the sureties on his official bond, shall

be liable; and his executor or administrator shall have such remedy for any such default or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

RECORDS OF THE COURT OF APPEALS.—*Sec.* 679. The records and proceedings of the court of appeals, appointed previous to the adoption of the present Constitution, shall be kept in the office of the clerk of the Supreme Court, who shall give copies thereof to any person requiring and paying for them in the manner provided by law for giving copies of the records and proceedings of the Supreme Court, and such copies shall have like faith and credit with all other proceedings of said court.

MARSHALS AND DUTY.—*Sec.* 680. The marshal is entitled to receive a salary at the rate of three thousand five hundred dollars a year. He shall attend the court at its sessions; shall serve and execute all process and orders issuing from it, or made by the Chief Justice or an associate justice in pursuance of law; and shall take charge of all property of the United States used by the court or its members. With the approval of the Chief Justice he may appoint assistants and messengers to attend the court, with the compensation allowed to officers of the House of Representatives of similar grade.

DUTY OF THE REPORTER.—*Sec.* 681. The reporter shall cause the decisions of the Supreme Court made during his office to be printed and published within eight months after they are made; and within the same time shall deliver three hundred copies of the volumes of said reports to the Secretary of the Interior. And he shall, in any year when he is so directed by the court, cause to be printed and published a second volume of said decisions, of which he shall deliver in like manner and time three hundred copies.

SALARY OF REPORTER AND PRICE OF REPORTS.—*Sec.* 682. The reporter shall be entitled to receive from the treasury an annual salary of twenty-five hundred dollars when his report of said decisions constitutes one volume, and an additional sum of fifteen hundred dollars when, by the direction of the court, he causes to be printed and published in any year a second volume. But said salary and compensation, respectively, shall be paid only when he causes such decisions to be printed, published and delivered within the time and in the manner prescribed by law, and upon the con-

dition that the volumes of said reports shall be sold by him to the public for a price not exceeding five dollars a volume.

Section 683 provides for the disposition of the copies of said reports delivered to the Secretary of the Interior.

Without the means thus provided by Congress, the Supreme Court could not have been properly constituted or organized. For to constitute a court in the sense used in the Constitution, there should not only be a judge or judges to hear and determine causes, but clerks to record and attest its acts and decisions, and ministerial officers to execute its commands and judgments and secure due order in its proceedings. Judicial power signifies the power with which courts are clothed, and this embraces not only the power to try and determine, but to execute its orders and judgments.

Under these provisions the Supreme Court was duly constituted, and it may take original cognizance of the cases specified in the Constitution. But we will consider its jurisdiction more particularly in a subsequent chapter.[1]

§ 278. **Tenure of office of the judges.**—Having set out the statutes providing for the organization of the Supreme Court, and shown the mode of appointment of the judges, it may be well to consider briefly the tenure by which the judges hold their offices.

We have noticed that the Constitution provides that "the judges of both the Supreme Court and inferior courts shall hold their offices during good behavior."

The question as to the policy and wisdom of a permanent tenure of office of judges received much attention at the time of the formation of the Constitution, and it has been the subject of discussion ever since that time. Many of the state constitutions have made these offices elective, and for a short term; and it can hardly be affirmed, in the light of experience under this mode of securing judicial officers, that the judges of the state courts have not generally maintained a character for ability and integrity equal to that secured by appointment and a holding for life or during good behavior. Notwithstanding many objections urged by speculative theorists and political philosophers, it is believed that judges selected by popular election and for short terms have generally given satisfaction; and there is certainly one advantage enjoyed by this

[1] See *post*, ch. xii.

mode of selecting judges as well as other officers, and that is that if they prove incompetent or unworthy, there is an opportunity for removal without much delay. But owing to the complicated character of our national government, and considering that the judiciary department is a co-ordinate and independent one, there are some important reasons why the judges should be appointed in the manner provided by the Constitution, and that the tenure of the office should continue during good behavior. This question was much discussed before the adoption of the Constitution. A contemporaneous writer of rare ability said: "The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince; in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright and impartial administration of the laws. Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution, because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or the wealth of society; and can take no active resolution whatever. It may be truly said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty. . . . Upon the whole, there can be no doubt that the convention acted wisely in copying from the models of those constitutions which have established good behavior as the tenure of judicial offices in point of duration; and that, so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government."[1]

[1] The Federalist, No. 78.

§ 279. **Terms of the Supreme Court.**—The provisions of the statute relating to the terms of the Supreme Court require that it shall hold one term annually at the seat of government, commencing on the second Monday of October, and such adjourned or special terms as it may find necessary for the despatch of business; and that "suits, proceedings, recognizances and processes pending in or returnable to said court shall be tried, heard and proceeded with as if the time of holding said session had not been" altered; that if at any session of the court a quorum does not attend on the day appointed for holding it, the justices who do attend may adjourn it from day to day for twenty days after the appointed time, unless before that time a quorum shall attend; that if a quorum does not attend within that time, the business of the court shall be continued over till the next appointed session; and that if, during a term, after a quorum has assembled, less than a quorum attend on any day, the justices attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

They further provide that the justices attending at any term when less than a quorum is present may, within the twenty days mentioned, "make all necessary orders touching any suit, proceeding or process depending in or returned to the court preparatory to the hearing, trial and decision thereof."[1]

[1] See Rev. Stat. §§ 684, 685, 686.

CHAPTER XII.

ORIGINAL JURISDICTION—AT LAW AND IN EQUITY.

§ 280. **Rules of practice.**—Having treated of the constitution and organization of the Supreme Court, we will now proceed to consider its original jurisdiction, and the pleadings, practice and procedure therein. It may be observed that there are no statutes or general rules of the court that specifically point out the practice or mode of procedure in the Supreme Court, as a court of original jurisdiction, or that prescribe the forms of pleadings therein. But a general statutory provision requires that "all writs and process issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof;" that "those issuing from the Supreme Court or a circuit court shall bear the teste of the Chief Justice of the United States, or when that office is vacant, of the associate justice next in precedence;" [1] and that "all process issued from the courts of the United States shall bear teste from the day of such issue." [2]

It is further declared by a general rule of the court that "this court consider the practice of the courts of the King's Bench and of Chancery in England as affording outlines for the practice of this court; and they will, from time to time, make such alterations therein as circumstances may render necessary." [3] The practice of chancery referred to is the practice of the High Court of Chancery of England. This practice would undoubtedly regulate the procedure in the federal courts so far as it would be applicable, not in all cases as positive rules, but as furnishing just analogies relating to the practice in the absence of rules of court or statutes prescribing the practice, and in cases where the rules of the English High Court of Chancery would not be strictly applicable.[4] The rules of this court further

[1] Rev. Stat. § 911. A summons or notice must be under the seal of the court and signed by the clerk: Peaslee *v.* Haberstro, 15 Blatch. 472; Dwight *v.* Merritt, 4 Fed. Rep. 614.

[2] Rev. Stat. § 912. A writ of error bearing the teste of the clerk only, and not that of the Chief Justice of the Supreme Court, is void: Wells *v.* McGregor, 13 Wall. 188.

[3] Gen. Rule 3.

[4] Equity Rule 90; Boyle *v.* Zacherie, 6 Pet. 648; Poultney *v.* La Fayette, 12 Pet. 472; Rhode Island *v.* Massachusetts, 14 Pet. 210; Florida *v.* Georgia, 17 How. 478.

provide that all process of the court shall be in the name of the President of the United States; that all process in common law or in equity issued against a state shall be served on the governor or chief magistrate and attorney-general of such state; that the process of subpœna issuing out of this court in any suit in equity must be served on the defendant sixty days before the return day of such process; that if, after due service of the same, the defendant does not appear at the return day contained therein, the plaintiff is at liberty to proceed *ex parte;* and that all motions must be in writing.[1]

For some time after the adoption of the Constitution and the organization of this court, it was a question much discussed whether, without an act of Congress regulating the practice and mode of procedure, this court could exercise any original jurisdiction in cases where the forms and modes of procedure of the English High Court of Chancery were not applicable. This question was first presented to the court in the case of Florida *v.* Georgia.[2] In this case the state of Florida filed a bill in this court against the state of Georgia, to establish a boundary between them, thereby invoking the aid of the original jurisdiction of the court. The Attorney-General filed a motion therein for leave to appear and plead on behalf of the United States, in such time and form as the court should order.

The case was a novel one, there being nothing in the practice or precedents of the English courts furnishing any guide, and but imperfect analogies as to the proper forms and practice in such a case. It was, however, determined that, although Congress might prescribe the modes and forms of proceeding for this court, yet this was not essential, and having failed so to do, the court should not on this account be deprived of jurisdiction; that it was the duty of the court under such circumstances to prescribe these to accomplish the ends for which the jurisdiction was given by the Constitution; and that, if the established forms and usages of law and equity afforded no precedents for a case within the jurisdiction of the court, it was the further duty of the court to mould and adopt the requisite forms so to attain the ends of justice, disregarding nice technicalities.[3]

[1] Gen. Rules 5 and 6.

[2] 17 How. 478 (1854).

[3] See also Grayson *v.* Virginia, 3 Dall. 339; Huger *v.* South Carolina,

The general rules of pleading, practice and procedure applicable to circuit courts of the United States, which we have already considered, would be equally applicable to the Supreme Court.

§ 281. **Procedure in equity; essentials of a bill.**—A party desiring to invoke the original jurisdiction of the Supreme Court on its equity side should first prepare his bill in the form required by the chancery practice in England, subject to such changes as have been made by the rules of this court and acts of Congress. Under the rules of this court he may omit the part usually called the confederacy clause, and the clauses commonly called the charging part of the bill; also what is generally known as the jurisdiction clause, that is, the clause "that the acts complained of are contrary to equity, and that the plaintiff is without any remedy at law."[1] And he "may, in the narrative or stating part of his bill, state and avoid by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defence or excuse to the case made by the plaintiff;" and the prayer of the bill must ask for the special relief to which the plaintiff supposes himself entitled. The bill must also contain a prayer for general relief; and if an injunction or writ of *ne exeat regno*, or any other special order pending the suit, is required, it must be specially asked for.[2]

The prayer for process or subpœna must also set forth the names of all the defendants named in the introductory part, and if any of them are known to be infants or under guardianship, it should state this fact, that the court may be able to make such orders on the return of the subpœna as justice may require. But it is sufficient to ask for an injunction *ne exeat regno*, or any other special order, pending the suit, in the prayer for relief, without repeating the same in the prayer for process.[3]

It is further required that "Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that upon the instruction given to him and the

3 Dall. 371; New York *v.* Connecticut, 4 Dall. 1; New Jersey *v.* New York, 5 Pet. 284; Rhode Island *v.* Massachusetts, 12 Pet. 657; s. c., 15 Pet. 233; Taylor *v.* Salmon, 4 Mylne & Craig 141; Boyle *v.* Zacherie, 6 Pet. 648; Pennsylvania *v.* Quicksilver Co., 10 Wall. 553.

[1] Equity Rule 21.

[2] Equity Rule 21.

[3] Equity Rule 23.

case laid before him there is good ground for the suit in the manner in which it is framed."[1]

Notwithstanding the formal jurisdiction clause may be omitted from a bill, it is essential that it should show facts giving the court jurisdiction. The original jurisdiction of the court is quite limited, depending in all cases upon the citizenship or character of the parties, and not upon the subject-matter or the value of the matter in controversy. The required citizenship or character of the parties should of course be set forth in the bill in order to show the jurisdiction of the court.[2]

§ 282. **When a state is a necessary party.**—Where the jurisdiction of the court depends upon the fact that a state is a party, it must appear from the bill that it is so in fact, and it is not sufficient that it be made to appear that the state is indirectly interested in the controversy and may be consequentially affected by the result. The state must in such cases be made a party on the record, or objection may be taken by demurrer on that ground.[3] But it is sufficient that the state be substantially a party, as where the bill is filed by the governor of a state on its behalf,[4] or where the claim made in a libel in admiralty is upon the governor as such, and officially, and not against him personally.[5]

If the suit is by the state against a corporation, it should be shown by the bill or declaration that the corporation is a citizen of another state, that is, incorporated by or organized under the laws of some other state, naming it; and it is not sufficient merely to aver that the corporation defendant is a body politic by the laws of another state and doing business within it.[6] Jurisdictional facts should be clearly averred and not left for inference.[7] Every bill must contain in itself sufficient matter of fact, both as to jurisdiction

[1] Equity Rule 24. Where a bill for an injunction was filed without the proper signature of counsel it was ordered to be taken from the files; but on being amended in this respect it was, on motion, reinstated, and the injunction granted as on a bill and motion *de novo:* Roach *v.* Hulings, 5 Cr. (C. C.) 637.

[2] Rev. Stat. § 687; Equity Rules 20 and 21; Georgia *v.* Brailsford, 2 Dall. 405; Georgia *v.* Madrazzo, 1 Pet. 110.

[3] Fowler *v.* Lindsey, 3 Dall. 411; Governor of Georgia *v.* Madrazzo, 1 Peters 110; Osborne *v.* Bank of U. S., 9 Wh. 738; Bank of U. S. *v.* Planters' Bank, 9 Wh. 904.

[4] Georgia *v.* Brailsford, 2 Dall. 405.

[5] Governor of Georgia *v.* Madrazzo, 1 Pet. 110.

[6] Pennsylvania *v.* Quicksilver Co., 10 Wall. 553.

[7] Railway *v.* Ramsey, 22 Wall. 322; Virginia *v.* West Virginia, 11 Id. 39. See also Bank of U. S. *v.* Planters' Bank, 9 Wh. 904; Bank of Kentucky *v.* Wister, 2 Pet. 321; The Cherokee Nation *v.* Georgia, 5 Id. 1.

and the subject of the claim made, to maintain the case of the plaintiff.[1]

§ 283. **Frame of bills; interrogatories.**—The introductory part of a bill should usually contain the names, places of abode, and a statement of the citizenship of all the parties, plaintiffs and defendants. Where, however, a state is a party, it would not be necessary or practicable to state the abode or citizenship of the state, but a statement of the fact that it is a state would be sufficient. The general principles of equity pleading, practice and procedure are applicable to all the federal courts having equity jurisdiction.[2]

For forms in the Supreme Court, see *post*, No. 220, *et seq.*

It is not necessary to interrogate the defendant, specially and particularly, upon any statement in the bill, unless it is desirable to do so to obtain a discovery.[3] If interrogatories are inserted, they should be numbered consecutively, 1, 2, 3, etc. And the interrogatories which either of the defendants are required to answer should be specified in a note at the foot of the bill, as follows: "The defendant A. B. [or others named] is required to answer the interrogatories numbered respectively 1, 2, 3," etc. And if the complainant in his bill waives an answer under oath, or only requires an answer under oath in regard to certain specified interrogatories, the answer of the defendant may be under oath to the whole bill, but it will not be evidence in his favor, except as to such part thereof as shall be directly responsive to such interrogatories, unless the cause is set down for a hearing on the bill and answer only.[4]

The answer may in such cases also be used as an affidavit, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; and an answer under oath to certain interrogatories will not prevent the defendant from becoming a witness in his own behalf, as provided by law.[5]

It is further prescribed that where interrogatories are used in a bill they shall be preceded by the following form: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to

[1] Harrison *v.* Nixon, 9 Pet. 483.
[2] Equity Rule 20. See also Fowler *v.* Miller, 3 Dall. 411.
[3] Amended Equity Rule 40.
[4] Equity Rule 41 and Amend.
[5] Rev. Stat. § 858; Equity Rule 41, as amended.

the best and utmost of their several respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say—

"1. Whether, etc.

"2. Whether, etc."

For form of bill to settle the boundary between states, see *post*, No. 221. For form of bill to restrain the use of a trade mark, see *post*, No. 230.

§ 284. **Leave to file a bill; practice; subpœna.**—The practice of obtaining leave to file a bill in this court is quite anomalous; but it seems common, if not universal, although there is no statute or rule of court upon the subject. The usual course is to file a motion asking leave to file the bill, which is generally heard *ex parte* on a regular motion day.[1] Where, however, the bill prayed an injunction to restrain the President of the United States from executing a law of Congress, it was held proper, under the peculiar circumstances of the case, to hear an argument against the motion for leave to file the bill.[2] If the leave to file a bill is granted, the clerk will as a matter of course, and without any order of the court or a judge thereof, issue a subpœna. But the order may be suspended or rescinded by any judge of the court, upon special cause shown therefor.[3]

For forms for Supreme Court, see *post*, No. 220, *et seq.*

§ 285. **Subsequent proceedings.**—It has been determined that if the state shall fail to appear after due service of process upon her, no coercive measures will be allowed to compel an appearance, but the complainant or plaintiff will be allowed to proceed *ex parte*;[4] and he may move for commissions to issue to take the depositions of witnesses; or he may move the trial of the cause on oral testimony, in the usual way, as soon as the cause is reached for trial, or as soon as permitted by the rules or orders of the court. It may be observed that the Supreme Court, in the exercise of its original jurisdiction, has the right to prescribe rules of practice and pro-

[1] Georgia *v.* Grant, 6 Wall. 241.

[2] Mississippi *v.* Johnson, 4 Wall. 475. See also Poultney *v.* La Fayette, 12 Pet. 472.

[3] Equity Rule 5.

[4] Massachusetts *v.* Rhode Island, 12 Pet. 755; Grayson *v.* Virginia, 3 Dall. 320; New Jersey *v.* New York, 5 Pet. 284.

cedure for itself or the inferior federal courts, and to make such deviations from the English common law and admiralty and chancery practice as are necessary to adapt the process and procedure of the court to the peculiar circumstances of cases arising in this country, limited only by such alterations or regulations as Congress may provide. In the exercise of this authority, the court framed General Rule 5, prescribing the persons on whom original process should be served, and the time of service, and the proceedings on a failure of appearance; and in the case last cited, on the failure of the defendant to appear after due service of process, it was, on motion of the complainant, ordered and decreed that the complainant be at liberty to proceed *ex parte;* and that unless the defendant, after being served with a copy of the order and decree sixty days before the next following term of the court, should appear before said term and answer the bill, the court would proceed to hear the cause on the part of the complainant, and to decree on the matter of said bill. Within the time required by the order and decree of the court, the state of New York appeared in the case by its attorney-general and filed a demurrer to the bill, and the question was raised whether this was a compliance with the order of the court requiring the defendant to answer. The court held that in a legal sense a demurrer was an answer, though not so in a technical sense, and that it was a sufficient compliance with the order.[1]

For form of decree and order on default in such cases, see *post*, No. 250.

§ 286. **Proceedings on the part of the defendant.**—If the defendant desires to appear and defend the cause, or for any purpose connected with it, he should at or before the return day of the process, which, as we have seen, must be at least sixty days after its service, cause an appearance to be entered by the clerk, either personally or by his solicitor, and for that purpose should file with him a precipe for an appearance. The appearance may be general, or special for some particular purpose.

For form of precipe for an appearance, see *post*, No. 236.

§ 287. **When a bill will be dismissed on motion.**—We have noticed that jurisdictional facts should be clearly set forth in the bill or declaration. A failure to do so would be fatal on a motion to dismiss or a demurrer for want of jurisdiction. In the case of Rhode

[1] New Jersey *v.* New York, 6 Pet. 323.

Island *v.* Massachusetts,[1] a motion was made to dismiss on the ground of a want of jurisdiction, which the court entertained although made after a plea in bar had been filed. But the court overruled the motion, holding they had jurisdiction of the parties and of the subject-matter.[2]

The general principle in relation to the special limited original jurisdiction of this court is that the court will not take cognizance of a cause where its authority to do so is not manifest from the record, and the court will take notice of this when it is apparent, whether objection for want of jurisdiction is made or not. See *post*, Form No. 226.

A motion to dismiss a cause, pending in the courts of the United States, is not analogous to a plea to the jurisdiction of a court of common law or equity in England. There, owing to the peculiar organization and powers of the courts, the rule is that a party claiming an exemption from the jurisdiction of the court must set out the reasons by a special plea in abatement, and show that some other court has the exclusive cognizance of the case, and must point out to the court where the case belongs. In order to quash a writ or dismiss a bill in England, for want of jurisdiction, the plaintiff must give a better one, and he can never put in a second plea to the jurisdiction of the court.

But in the federal courts, irregularity of process or defective service of the same is waived by an appearance and pleading to the issue.[3] And when the objection is that the court has no jurisdiction over the parties or the subject-matter, the defendant need not give the plaintiff a better writ or bill.

§ 288. **Demurrer for want of jurisdiction.**—A demurrer to a bill or declaration operates as an admission, for the purposes of the demurrer only, that all the averments which are properly pleaded are true. Its purpose is to bring before the court the question of the right to maintain the suit, admitting the allegations to be true; and the court will not inquire *aliunde* what facts might or might not defeat it, as this is the office of a plea or answer.[4]

[1] 12 Pet. 657.

[2] Equity Rule 6. See also United States *v.* Hughes, 11 How. 552; Georgia *v.* Stanton, 6 Wall. 50; Cohens *v.* Virginia, 6 Wh. 264; Harding *v.* Handy, 11 Wh. 103; Harrison *v.* Nixon, 9 Pet. 483.

[3] Voorhees *v.* Bank of the U. S., 10 Pet. 449; Toland *v.* Sprague, 12 Pet. 300; Knox *v.* Summers, 3 Cr. 496; Pollard *v.* Dwight, 4 Cr. 421.

[4] Griffing *v.* Gibb, 2 Black 519; Foot *v.* Link, 5 McLean 616; Ocean Insurance Co. *v.* Fields, 2 Story 59;

It is manifest that if there is a want of allegations showing that the parties to the suit are the necessary and proper parties to give the court jurisdiction, this would be good ground for demurrer, and for a dismissal; and the proper practice would be to demur, although advantage of the defect might be taken afterwards by motion, plea or answer.[1]

So far as our present purpose is concerned it will be necessary to consider the demurrer only in relation to its office where there is a want of proper allegations in a bill or declaration as to the character of the parties, as it is this which gives the court original jurisdiction. We should, however, observe that even where the controversy is between states, the court will not take cognizance of a controversy which relates solely to matters of a political character; and a bill which asks for relief in such a case would be subject to a demurrer.[2] But where the political question involved, as that of the right of sovereignty and jurisdiction of a state over disputed territory, is merely incidental to the main question to be determined, as in case of a bill to settle the question of a disputed boundary between states, the question is not a political one, so as to oust the jurisdiction of the court.[3]

In Georgia *v.* Stanton the objection to the jurisdiction of the court was taken by motion, but it illustrates the general doctrine equally as well as if it had been raised by a demurrer. The court determined that the bill, both in the body of it and in the prayer for relief, called for the judgment of the court upon political questions; that the rights for the protection of which the authority of the court was invoked were not those of a private character, but related to those of sovereignty and political jurisdiction; and that the court had no jurisdiction over the subject-matter presented by the bill.[4]

For form of demurrer for want of jurisdiction, see *post*, No. 225.

§ 289. **Certificate of counsel and affidavit required.**—It is further provided by rule that "no demurrer or plea shall be filed to any

Woodworth *v.* Edwards, 3 Woodb. & M. 120; Bayerque *v.* Cohen, 1 McAll 113; 1 Dan. Ch. Pl. 543.

[1] Jackson *v.* Ashton, 8 Pet. 148; Wood *v.* Wagnon, 2 Cr. 9; Ross *v.* Duvall, 13 Pet. 45; Gaylords *v.* Kelshaw, 1 Wall. 81.

[2] State of Georgia *v.* Stanton, 6 Wall. 50; The Cherokee Nation *v.* Georgia, 5 Pet. 1.

[3] Rhode Island *v.* Massachusetts, 12 Pet. 657; Florida *v.* Georgia, 17 How. 478; Cherokee Nation *v.* Georgia, 5 Pet. 1.

[4] 6 Wall. 50. See also Mississippi *v.* Johnson, 4 Wall. 475.

bill, unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by affidavit of the defendant that it is not interposed for delay, and if a plea, that it is true in point of fact. For form of certificate of counsel to a demurrer, see *post*, No. 226; for form of affidavit, No. 227.

§ 290. **Office of a plea.**—The office of a plea is to furnish some fact or facts not apparent on the bill, but which, if they had been therein stated, would have rendered the bill demurrable. The plea should contain averments which, if true, would defeat the relief asked for by the plaintiff. It is allowed in order to save expense and to protect the defendant from a discovery which ought not to be required under the facts and circumstances of the case; and it enables the court to decide upon the issues, taking the bill to be true so far as it is not contradicted or qualified by the plea.

An illustration of the office of plea might be found in case of a bill filed in this court by a consul against a citizen. If it should be averred in the bill that the complainant was a consul, which would be an essential jurisdictional fact to be shown, when in fact he was not a consul, the objection on this account could not be taken by demurrer, because a demurrer admits the facts well pleaded. The question could in such a case be raised by a plea denying that the plaintiff was in fact a consul. The jurisdictional question would thus be presented and determined by the judgment of the court on the single issue whether the plaintiff was or was not a consul. This would be a plea to the jurisdiction of the court in abatement, and not in bar of another action in another court.[1] Another appropriate case for a plea would be where there was another suit pending for the same matter, where it would also be in abatement.[2]

It is sometimes necessary to accompany a plea with an answer; especially is this required in certain cases by the rules of practice prescribed for the courts of equity of the United States. Equity Rule 32 provides that "in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying

[1] 1 Dan. Ch. Pl. (4 Am. ed. Perkins) 626; Jones *v.* League, 18 How. 76.

[2] Dan. 2 Ch. Pl. (4 Am. ed.) 633; Mathews *v.* Robers, 1 Green, Ch. 338; Way *v.* Bagshaw, C. E. Green (16 N. J.) 213; Cleveland, etc., R. Co. *v.* Erie, 27 Pa. St. 380; Mann *v.* Richardson, 21 Pick. 259.

the fraud and combination, and the facts on which the charge is founded."[1]

It is not, however, within the proper scope of this treatise to consider fully the various kinds of pleadings at law and in equity; and the reader is referred to those special treatises on these subjects where these matters are discussed and illustrated.

We may remark in this connection that by the general rules of equity practice, the plea was required to be verified by affidavit, and under a rule of this court a plea as well as a demurrer is not only required to be supported by the affidavit of the defendant that it is not interposed for delay, and in case of a plea, that it is in point of fact true, but the certificate of counsel is required that in his opinion it is well founded in point of law.[2]

For forms of plea, certificate and verification, see *post*, Nos. 47, 231.

For form of affidavit to demurrer, see *post*, No. 46.

§ 291. **Setting down for a hearing.**—To set down a demurrer or plea for a hearing is to enter the title of the cause in the list of matters ready to come on for a hearing at the next rule day of the court, specifying the matter to be heard, and of which the opposite party must take notice. The entry may be made as a matter of course. On the argument of a plea it has been held that the allegations of the bill may be taken less strongly against the plaintiff than they would be on the argument of a demurrer.[3] "If a plea is supported by an answer, upon the argument of the plea the answer may be read to counterprove the plea; and if the defendant appears not to have sufficiently supported his plea by his answer, the plea must be overruled or ordered to stand for an answer only." Where a defendant answered to an original bill, which was afterwards amended, and the defendant put in a plea to the amended bill, the plaintiff was permitted to read the answer to the original bill, to counterprove the plea to the amended bill.[4]

On the argument of a plea the general rule is that the averments of the bill must be taken as true, except as to those denied by the plea, and by the answer if one is filed in support of the plea; and

[1] 1 Dan. Ch. Pl. (4th Am. ed.) 614; Story's Eq. Pl. § 681, *et seq.*; Syms *v.* Lyle, 4 Wash. (C. C.) 303; Livingston *v.* Story, 9 Pet. 632; s. c., 11 Pet. 352; De Sobry *v.* Nicholson, 3 Wall. 420; Heath *v.* Erie R. Co., 8 Blatch. 347.

[2] Equity Rule 31.

[3] Rumbold *v.* Forteath, 2 Jur. N. S. 686.

[4] 1 Dan. Ch. Pl. (4th Am. ed.) 695.

if set down by the plaintiff for a hearing, without a reply, the averments contained in it must be treated as true.[1] So the general rule is that no plea or demurrer can be held bad and overruled upon the argument merely because it does not cover so much of the bill as it might have extended to.[2] Nor shall it be overruled merely because the answer of the defendant may extend to some part of the same matter as is covered by it.[3]

§ 292. **Where the plea or demurrer is overruled.**—If, upon the hearing of a plea or demurrer, it is overruled, the plaintiff, on general principles, is entitled to his costs up to that time, unless the court is satisfied that he had good ground, in point of law or fact, to interpose the same, and that it was not put in vexatiously or for the purpose of delaying the cause;[4] and the court may, in accordance with the general procedure in such cases, order the defendant to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day or at such other time as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof the bill may, if so ordered, be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.[5]

§ 293. **Where the plea or demurrer is allowed.**—If a plea or demurrer is allowed upon the hearing, the court may allow the plaintiff, on motion, to amend the bill upon such terms as appear reasonable, but the defendant is entitled, as we have stated, to his costs.[6] In case of a failure of the plaintiff to reply to a plea, or to set down the same for a hearing at the proper time, he may be considered as admitting the truth and sufficiency of it, and his bill must be dismissed of course, unless the court shall allow him further time to reply or to set the plea down for argument.[7] But the dismissal of a bill in such a case would be no bar to another suit.

For form of answer to a bill of complaint, see *post*, No. 232.

For form of oath to an answer, see *post*, No. 233.

[1] Borgandus *v.* Trinity Church, 4 Paige 178; Lawrence *v.* Pool, 2 Sand. S. C. 540; Gallagher *v.* Roberts, 1 Wash. (C. C.) 320; Rowley *v.* Williams, 5 Wis. 151; Davison *v.* Johnson, 1 C. E. Green (16 N. J. Eq.) 112.

[2] Equity Rule 36.

[3] Equity Rule 37.

[4] Equity Rule 34.

[5] Id.; Bank of U. S. *v.* White, 8 Pet. 262.

[6] Equity Rule 35.

[7] Hughes *v.* United States, 4 Wall. 232.

CHAPTER XIII.

WRITS OF ERROR AND APPEAL.

§ 294. **Appellate jurisdiction of the Supreme Court.**—The appellate jurisdiction of the Supreme Court is the most extensive and important of its functions. The Revised Statutes provide that "all final judgments of any circuit court or any district court acting as a circuit court, in civil actions brought there by original process or removed there from courts of the several states, and all final judgments of any circuit court in civil actions removed there from any district court, by appeal or writ of error, where the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."[1] Besides this, it can on appeal, as we shall hereafter more particularly notice, review the decisions of the inferior federal courts in equity and admiralty cases; and, in some special cases, without regard to the value of the matter in controversy; and the final judgments of state courts may also be reviewed on writs of error.[2]

§ 295. **Writ of error; final judgments.**—It will be observed that the judgments that may be reviewed upon a writ of error are final ones. If a cause is not finally disposed of by the judgment of the circuit court, it is not such a final judgment as may be reviewed on error.

Thus, an order of the circuit court to quash an execution;[3] or a decision of the court upon a rule or motion;[4] or a judgment upon a demurrer to some parts of a replication, and a motion to strike out other parts, still leaving in the replication some essential allegations,[5] are not such final judgments as can be reviewed by the Supreme Court on a writ of error.[6]

[1] Rev. Stat. § 691, as amended by the act of February 16, 1875, ch. 77, § 3, 18 Stat. 316.

[2] Rev. Stat. §§ 692, 709. See also *post*, § 327.

[3] McCargo *v.* Chapman, 20 How. 555; Boyle *v.* Zacherie, 6 Pet. 648; Early *v.* Rogers, 16 How. 599.

[4] Toland *v.* Sprague, 12 Pet. 300; Brooks *v.* Hunt, 17 John. 484; Doswell *v.* De La Lanza, 20 How. 29; Henderson *v.* Moore, 5 Cr. 12; Barr *v.* Gratz, 4 Wh. 220; Marine Ins. Co. *v.* Hodgson, 6 Cr. 206.

[5] Holcombe *v.* McKusick, 20 How. 552.

[6] If a circuit court on motion dismiss a suit on the ground that it has

The whole cause in the court below must be disposed of, as settled by the general practice in this country and by the King's Bench in England, or the writ will not lie; and the cause cannot be sent up in fragments.[1] So an order of the court, affirming the refusal of the court below to grant a new trial, is not a final judgment which can be reviewed in this court.[2] Nor will a writ of error lie from a decision refusing a change of venue, or to postpone a trial.[3]

But a final disposition of the whole case, and as to all the parties thereto, is a final judgment from which a writ of error or an appeal will lie; and where the circuit court sustains a demurrer that determines the merits of the case and renders judgment thereon, this may be re-examined on a writ of error, without any formal bill of exceptions.[4]

For forms in such cases, see *post*, No. 236, *et seq.*

§ 296. **All the parties must join in a writ of error or appeal.**—It is essential that all the parties against whom a joint judgment has been rendered should join in the application for a writ of error or in the appeal, unless sufficient cause be shown for the non-joinder.[5] If one of two parties refuses to join in a writ of error, the other party may issue a writ of summons, by which the party refusing to join may be brought before the court; and if he still refuses, an order or judgment of severance may be made by the court in which case the party desiring to prosecute a writ of error or appeal can do so alone. The effect of the judgment of severance is that the party refusing to proceed is barred from prosecuting the same right in another action, and the defendant in the writ of error cannot be harassed by a subsequent suit or proceeding for the same cause of action, by the party thus refusing to unite in the application for the writ, it being joint in its nature.[6]

no jurisdiction, a writ of error will not lie to revise the judgment: Insurance Co. *v.* Comstock, 16 Wall. 258; Railroad Co. *v.* Wiswall, 23 Wall. 507.

[1] United States *v.* Girault, 11 How. 22; Peet *v.* McGraw, 21 Wend. 667.

[2] Sparrow *v.* Strong, 4 Wall. 584; Connor *v.* Peugh, 18 How. 394; Earley *v.* Rogers, 16 How. 599; Pomeroy *v.* State Bank, 1 Wall. 592; Steamboat Burns, 9 Wall. 237.

[3] Cook *v.* Burnley, 11 Wall. 659.

[4] Rogers *v.* Burlington, 3 Wall. 654; Gorman *v.* Lenox, 15 Pet. 115; Suydam *v.* Williamson, 20 How. 436.

[5] Williams *v.* Bank, 11 Wh. 414; Masterson *v.* Herndon, 10 Wall. 416; Hampton *v.* Rouse, 13 Wall. 187; Simpson *v.* Greeley, 20 Wall. 152; O'Dowd *v.* Russell, 14 Wall. 402.

[6] Simpson *v.* Greeley, 20 Wall. 152; Mussina *v.* Cavazos, 6 Wall. 355; Masterson *v.* Herndon, 10 Wall. 416; Williams *v.* Bank of the U. S., 11 Wh. 414; Todd *v.* Daniel, 16 Pet. 521; Wilson *v.* Insurance Co., 12

But there are cases where, although there are several parties defendant, one of them may bring a writ of error without joining the others. For example, where a suit was brought by the plaintiffs against a defendant to recover a balance due for work and materials furnished in building a house, and to enforce a lien therefor against the house and the lot on which it was situated; and several other parties who "had or claimed to have some interest, claim or lien on the incumbered premises," as stated in the petition or bill, were made defendants; but it was also claimed by the plaintiff in his said petition or bill that "their interest, claim or lien, if any, had accrued subsequently to that of plaintiffs;" and it prayed for a personal judgment only, against the party for whom the work and materials were furnished, and that the other defendants be barred and foreclosed of all right, claim, lien, etc., in, on and to the premises, and that the premises be decreed to be sold, etc., and a judgment was rendered against the defendant first above mentioned in *personam*, for the debt, and a decree entered that the premises should be sold, etc., and to this judgment the latter sued out a writ of error, it was held by the Supreme Court that the judgment was of such a separate character as authorized him to ask to have it reviewed in the latter court, without joining with him his co-defendants in the court below.[1]

§ 297. **Proper parties on the record.**—A judgment will not be re-examined upon a writ of error unless there are proper parties to it. An inanimate object, like a vessel, has not the legal capacity to prosecute legal proceedings in the federal courts; and hence it cannot prosecute a writ of error or appeal. But in proceedings *in rem*, if a person claims the thing or its proceeds, he becomes a party to the proceedings, and has all the rights in respect to a writ of error or an appeal that any other party has.[2]

§ 298. **Amount in controversy.**—The provision of the statute under consideration limits the right to the writ to cases "where the matter in dispute, exclusive of costs, exceeds the sum or value of $5000."[3]

Pet. 140; Brooke's Abr. 238, *tit.* "Summons and Severance;" 2 Rolle's Abr., *tit.* same, 488; Arch. Civ. Plead. 54; Tidd's Prac. 129, 1136, 1169; Deneal *v.* Archer, 8 Pet. 526; Smyth *v.* Strader, 12 How. 327.

[1] Germain *v.* Mason, 12 Wall. 259.

[2] Steamboat Burns, 9 Wall. 137.

[3] Rev. Stat. § 691, as amended by the act of February 16, 1875.

It is manifest that the judgment itself frequently determines the question as to the right so far as the value in controversy is concerned, as, for example, where it is against a defendant and it does not exceed $5000, exclusive of costs. In such a case if he were to prosecute a writ of error the Supreme Court would have no jurisdiction, although the claim of the plaintiff might exceed that sum.[1] Thus where the plaintiff claimed for the infringement of a patent more than the amount required to entitle him to a writ of error, but obtained a judgment for only $400, it was held on a writ of error by the defendant that the amount in controversy as to him was only $400, and that the court had no jurisdiction of the writ.[2]

If the judgment below is against the defendant, the amount of the judgment on general principles would fix the amount in controversy as to him, in the absence of a counter claim; but if the judgment be less than $5000 for either party, and the plaintiff sues out the writ of error, this court has jurisdiction if the damages claimed in the declaration, less the amount of the judgment, exceed that sum.[3] The matter in controversy is the amount at the time the judgment is rendered, and when the right to a review attaches; hence the interest accruing thereafter cannot be added to the judgment in computing the amount in controversy.[4] The amount in dispute is usually found in the pleadings, but the court will not be confined to them in determining this question of the sufficiency of the matter in controversy, and it is sufficient to defeat the right review if it otherwise appears in the record.[5]

In an action upon a money demand where the general issue is pleaded, the value in dispute is the debt claimed and its amount stated in the body of the declaration, and not merely the damages claimed in the prayer for judgment at its conclusion; and if the debt does not exceed $5000 the plaintiff is not entitled to a review on a writ of error, although the amount of damages claimed exceeds that sum.[6] But if an action is brought to recover less than the jurisdictional amount required on a writ of error, and the defendant pleads a set-off or counter claim in excess of that amount in a state

[1] Smith *v.* Honey, 3 Pet. 469.

[2] Gordon *v.* Ogden, 3 Pet. 33 (1830). See also Rodd *v.* Heartt, 17 Wall. 354; Clifton *v.* Sheldon, 23 How. 481; Wise *v.* Turnpike Co., 7 Cr. 276.

[3] Walker *v.* United States, 4 Wall. 163; Gordon *v.* Ogden, 3 Pet. 33.

[4] Bank of U. S. *v.* Daniel, 12 Pet. 32; Smith *v.* Honey, 3 Pet. 469; Walker *v.* United States, 4 Wall. 163; Western Union Tel. Co., 93 U. S. 565.

[5] Gray *v.* Blanchard, 97 U. S. 564.

[6] Lee *v.* Watson, 1 Wall. 337; Schacker *v.* Hartford Fire Ins. Co., 93 U. S. 241.

where he is entitled to a judgment for the excess of such a set-off or counter claim, if the judgment is against him he may sue out a writ of error.[1] The amount of the matter in controversy must exceed $5000, or there would be no jurisdiction on a writ of error; hence if it is precisely that amount, no writ of error lies.[2] And if the verdict is for more than $5000, and the party in whose favor it is rendered will enter a remittitur for the excess before the entry of a judgment on the verdict, this will defeat any right to the writ, as the amount of the matter in controversy at the time of the judgment entry would be less than the amount required.[3] And if a judgment is for more than $5000, yet if the cause was tried on an agreed statement of facts in which the defendant admitted that he owed sufficient of the amount claimed to reduce the matter in dispute to less than that sum, no writ of error will lie.[4]

The same general principles prevail where the value of the amount in controversy is an element of jurisdiction in all the various federal courts, whether at law or in equity, and whether on a writ of error or appeal.[5]

§ 299. **Where the matter in controversy is not susceptible of valuation.**—The matter in controversy must be such as is capable of a pecuniary estimate of its value, otherwise there can be no appellate jurisdiction of the suit. Thus, for example, where the matter in dispute is the right to freedom;[6] or the right to the custody of a minor child;[7] or whether the defendant below is liable to imprisonment on execution process;[8] or as to the right of guardianship of the persons and property of children, but not on account of any pecuniary value attached to the office,[9]—there is in such cases no right of revision on writ of error or appeal, as there is no matter in dispute susceptible of a pecuniary valuation.

But it has been held that a "mining claim" in Nevada may be

[1] Ryan *v.* Bindley, 1 Wall. 66.

[2] Walker *v.* United States, 4 Wall. 163; Western Union Tel. Co. *v.* Rogers, 93 U. S. 565.

[3] Thompson *v.* Butler, 95 U. S. 694.

[4] Tinstman *v.* First Nat. Bk., 100 U. S. 6.

[5] See *ante*, ch. 8; also Yzanga Del Valie *v.* Harrison, 93 U. S. 233; Cook *v.* United States, 2 Wall. 518. The judgment against the defendant is *prima facie* the amount in controversy, and this continues until the contrary is shown: Troy *v.* Evans, 97 U. S. 1. If the value of the amount in controversy is precisely $5000, no writ of error lies: Western Union Tel. Co. *v.* Rogers, 93 U. S. 565.

[6] Lee *v.* Lee, 8 Pet. 44.

[7] Barry *v.* Mercein, 5 How. 103.

[8] Pratt *v.* Fitzhugh, 1 Blatch. 271.

[9] De Kraft *v.* Barney, 2 Black 704; Ritchie *v.* Manro, 2 Pet. 243. A writ of error will not lie to a refusal to set aside a judgment on motion: Connor *v.* Peugh, 18 How. 394.

the subject of a controversy, and of value in money, even though the land on which the claim exists has never been surveyed and brought into market; and if it appears that it is of the requisite value, the Supreme Court will take cognizance of the case upon a writ of error or appeal.[1]

It is not sufficient, as we have noticed, that the value of the matter in dispute is precisely five thousand dollars, but it must exceed that sum to give this court jurisdiction; and where the judgment is for that amount in favor of the plaintiff, and the defendant prosecutes in error, the amount in controversy is fixed by the judgment, and this court has no jurisdiction.[2]

§ 300. **Value a jurisdictional fact; consent cannot confer jurisdiction.**—It is evident that the value of the matter in dispute is an essential jurisdictional fact, and this court will not take cognizance of a writ of error or appeal unless it be made in some manner to appear that it is of the value fixed by the statute. And it is a general doctrine of the federal courts that consent cannot confer jurisdiction in respect to the value of the amount in controversy.[3]

The statute carefully restricts the appellate jurisdiction of this court, and where this is wanting, or is not made to appear from the record, it will not examine into the questions presented in a case by the consent of parties or on the request of counsel.[4]

§ 301. **Where the value of the matter in controversy does not appear on the record.**—In some cases it is not essential that the value of the matter in controversy be stated in the declaration or other pleading; as for instance in cases of replevin, and of proceedings for a writ of mandamus, and in suits in ejectment and for dower.

On a writ of error or appeal in such cases, the practice is to allow affidavits in the Supreme Court to show the value of the matter in the controversy.[5] But this will not be allowed on appeal

[1] Sparrow *v.* Strong, 3 Wall. 97.

[2] Walker *v.* United States, 4 Wall. 163; Knapp *v.* Banks, 2 How. 73; Smith *v.* Honey, 3 Pet. 469; Gordon *v.* Ogden, Id. 33.

[3] Kelsey *v.* Forsyth, 21 How. 85; Guild *v.* Frontin, 18 How. 135; Suydam *v.* Williamson, 20 How. 428; Sampson *v.* Welsh, 24 How. 207. But see Arthurs *v.* Hart, 17 How. 6; Shankland *v.* Washington, 5 Pet. 390; Railroad Co. *v.* Ramsey, 22 Wall. 322.

[4] Mills *v.* Brown, 16 Pet. 525; The Lucy, 8 Wall. 307; The Nonesuch, 9 Wall. 504; Pennsylvania *v.* Quicksilver Co., 10 Wall. 558; Railway Company *v.* Ramsey, 22 Wall. 322; Walker *v.* Taylor, 5 How. 64.

[5] Rush *v.* Parker, 5 Cr. 287; *Ex parte* Bradstreet, 7 Pet. 634; Course *v.* Steadman, 4 Dall. 22. See also Peyton *v.* Robertson, 9 Wh. 527; Cooke *v.* Woodrow, 4 Cr. 13.

after the cause has been dismissed for want of jurisdiction apparent upon the record.[1] The same practice prevails in admiralty cases; and where it does not appear from the record in those cases what the value of the interest of the appellant is, he will be permitted in this court to make proof that his interest exceeds the jurisdictional sum, and allowed time therefor.[2]

§ 302. **When the value stated in the pleading is conclusive.**— Where the declaration or bill states the value of the property or interest in controversy, this is held to be conclusive of that fact, and affidavits will not, generally, be received to show the property or interest of more value.[3] Where there was a claim on a fund in the registry of the admiralty of several mortgages secured by one mortgage, and the fund exceeded the jurisdictional amount, it was held that an appeal would lie to this court by the mortgagees in a body, though the claim of no one of them exceeded that sum.[4] But where a decree was made by the circuit court sitting in admiralty that two persons should pay a certain amount of freight in different sums, neither of which amounted to the sum that gave the right of appeal, though the sums decreed to be paid by both exceeded that amount, the court, on appeal by one of the parties, held that it must be dismissed for want of jurisdiction, as the rights of the two were distinct and independent, and that if the freight was a joint matter, both should have joined in the appeal.[5] So where, in proceedings under libels in admiralty, for seamen's wages, the circuit court adjudged that there was due the libellants over $32,000 from the respondents, and a separate decree was entered for the amount due each libellant respectively, but none of the sums thus decreed amounted to the jurisdictional sum required for an appeal, and from these separate decrees the respondents in the circuit court prayed an appeal to this court, and gave a separate appeal bond upon the appeal from each, as well as a joint appeal from the whole, the appeal was dismissed, upon the ground that the sum in controversy in each case was less than the amount required to confer jurisdiction on this court.[6]

[1] Richmond *v.* Milwaukee, 21 How. 391.

[2] The Grace Girdler, 6 Wall. 441; Richmond *v.* Milwaukee, *supra.*

[3] Richmond *v.* Milwaukee, 21 How. 391; Brown *v.* Shannon, 20 How. 55; Bank of Alexandria *v.* Hooff, 7 Pet. 168.

[4] Rodd *v.* Heartt, 17 Wall. 354.

[5] Clifton *v.* Sheldon, 23 How. 481.

[6] Oliver *v.* Alexander, 6 Pet. 143.

The same doctrine applies in proceedings by a libel, for salvage, and in proceedings *in rem* generally.

When separate claims are interposed for salvage, although the libel is joint against the whole property, each claim is treated as a separate and distinct proceeding. In form it is joint, but in its nature and effect it is a several suit of each claimant, upon which there may be a separate and independent hearing and decree. It follows therefore, in such cases, that to entitle the claimants to an appeal there must be the jurisdictional amount required as to each of the claimants.[1]

§ 303. **Appeals in equity and admiralty cases.**—The statutes provide for an appeal in equity cases as follows: "An appeal shall be allowed to the Supreme Court from all final decrees of any circuit court or of any district court, in cases of equity and of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum or value of [five] thousand dollars, and the Supreme Court is required to receive, hear and determine such appeals."[2]

It will be observed that the sum or value of the matter in controversy is the same as in case of writs of error, and that the amount in controversy is an essential element of jurisdiction on an appeal. The decisions on this question which we have cited in presenting the jurisdiction of this court on a writ of error would be equally applicable in cases of appeals from the decisions of the circuit courts, and the district courts acting as circuit courts, in cases of equity, and of admiralty and maritime jurisdiction.

An appeal can only be taken in the mode prescribed and under the circumstances provided for by the statute. The conditions required by the statute must exist, or the Supreme Court will have no jurisdiction; as even the agreement or consent of parties will not confer it. Its appellate power is regulated and limited by the statute.[3]

§ 304. **Final decrees.**—An appeal from a decree of the circuit or district court, in cases of equity and of admiralty and maritime juris-

[1] Stratton *v.* Jarvis, 8 Pet. 4.

[2] Rev. Stat. § 692, as amended by the act of Feb. 16, 1875, ch. 77, § 3, 18 Stat. 316.

[3] Gruner *v.* United States, 11 How. 163; The Lucy, 8 Wall. 307; The Nonesuch, 9 Wall. 505; The Alicia, 7 Wall. 572; Merrill *v.* Petty, 16 Wall. 338; Sampson *v.* Welsh, 24 How. 207. See also, as to right to appeal in case of intervention and other special cases, Sall *v.* Central R. Co., 93 U. S. 412; *Ex parte* Jordan, 94 U. S. 248; *Ex parte* Railroad Co., 95 U. S. 221; Day *v.* Washburn, 23 How. 309.

diction, can only be taken from a final decree.[1] But a decree by consent is a final one, from which an appeal may be taken.[2] It is manifest that any decree of a circuit court, or of the district court acting as a circuit court, which settles all the legal rights of the parties in a cause within the pleadings, and determines the whole matter in controversy, is final, and an appeal may be taken therefrom.[3] One who was not a party to the original proceeding cannot appeal unless he shows that he has been admitted as a party by the express order of the court, or has been treated as a party to the record.[4]

§ 305. **Illustration.**—Where a decree in admiralty was made that a sum of money was due, without ascertaining the amount of money or decreeing its payment, it was held that this was not a final decree, and the appeal therefrom was dismissed on that account.[5] But a decree setting aside certain deeds as fraudulent and void; that certain lands and personal property should be delivered to complainant; and that an account of profits should be taken; and further providing that the bill be retained for certain matters referred to a master for a report, and that as to other matters it be dismissed without prejudice, was held to be a final decree within the meaning of the statute.[6] And a decree deciding the right to property in controversy and directing it to be delivered by the defendant to the complainant, and providing for its immediate execution, but leaving some accounts to be adjusted in pursuance of the decree, was held to be a final decree within the statute.[7]

§ 306. **What decrees are not final.**—If the decree does not settle the rights of the parties to the controversy, nor substantially determine the rights of the parties under the pleadings, it is not a final one from which an appeal can be taken. Thus, no appeal can be taken from a decree for costs alone;[8] or from an order refusing to permit a person to intervene;[9] or from a decree of the circuit

[1] McCollum *v.* Eager, 2 How. 61; Beebe *v.* Russell, 19 Id. 283; Crawford *v.* Points, 13 Id. 11; Craighead *v.* Willson, 18 Id. 190.

[2] Pacific Railroad *v.* Ketchum, 101 U. S. 289.

[3] Crosby *v.* Buchanan, 23 Wall. 420; Beebe *v.* Russell, 19 How. 283; French *v.* Shoemaker, 12 Wall. 86; Thompson *v.* Deem, 7 Id. 343; Marin *v.* Lalley, 17 Id. 14; Butterfield *v.* Usher, 91 U. S. 246; Sage *v.* Railroad Co., 96 Id. 712; Fuller *v.* Claflin, 92 Id. 14.

[4] *Ex parte* Cutting, 94 U. S. 14; Sage *v.* Central R. Co., 93 Id. 412; *Ex parte* Jordan, 94 Id. 248.

[5] Montgomery *v.* Anderson, 21 How. 386.

[6] Forgay *v.* Conrad, 6 How. 201. See also Michoud *v.* Girod, 4 Id. 503; Whiting *v.* Bank of U. S., 13 Pet. 15.

[7] Thompson *v.* Dean, 7 Wall. 342.

[8] Elastic Fabric Co. *v.* Smith, 100 U. S. 110.

[9] *Ex parte* Cutting, 94 U. S. 14.

court, affirming a decree of the district court, enjoining proceedings under a treasury warrant of distress;[1] or from an order of the circuit court refusing to release a party on a writ of *habeas corpus;*[2] or from an order disbarring an attorney;[3] or from an entry of a decree merely in pursuance of a mandate;[4] or from a decree directing a defendant to execute a conveyance of certain property, and referring the case to a master to take an account of the rents and profits;[5] or from a decree declaring an assignment for the benefit of creditors void, and referring the cause to a master to take an account of the property;[6] or from a decree for the sale of property to enforce a lien, which does not ascertain the property nor the amount of the debt;[7] or from a decree dissolving an injunction without dismissing the bill;[8] or from an order refusing to set aside a decree;[9] or from a decision upon an application to set aside a decree and permit a party to except to a master's report;[10] or from an order refusing to grant a rehearing;[11] or from a decree either maintaining or dismissing a cross-bill;[12] or from a decree upon a cross-bill made before the final decree upon the original bill.[13]

§ 307. **Decisions illustrating the subject.**—Where a case in admiralty is appealed from the district to the circuit court, the latter proceeds *de novo*, as though no trial had been had in the district court, and a new decree is made. Hence the circuit court should not make an order affirming the decree of the district court, and if such an order is made in such a case, it is not a final decree from which an appeal lies to this court.[14] Nor does an appeal lie from a decision upon a motion made to dissolve an injunction.[15] Nor does it lie from the decision of the circuit court, in the exercise of its revisory powers, over the decisions of registers in bankruptcy relating to

[1] United States *v.* Nourse, 6 Pet. 470.
[2] *In re* Philip Henrich, 5 Blatch. 414.
[3] *Ex parte* Robinson, 19 Wall. 513.
[4] United States *v.* Fremont, 18 How. 30; Corning *v.* Troy Iron, etc., Factory, 15 Id. 451; United States *v.* Fossalt, 21 Id. 445.
[5] Beebe *v.* Russell. 19 How. 283.
[6] Pullian *v.* Christian, 6 How. 209.
[7] Railroad Co. *v.* Swasey, 23 Wall. 405.
[8] Hiriat *v.* Ballou, 9 Pet. 156; Thomas *v.* Wooldridge, 23 Wall. 283.
[9] Brockett *v.* Brockett, 2 How. 238; Wylie *v.* Coxe, 14 Id. 1; McMickin *v.* Perin, 18 Id. 507.
[10] Terry *v.* Commercial Bank, 92 U. S. 454.
[11] Cambuston *v.* United States, 95 U. S. 285.
[12] Ayers *v.* Carver, 17 How. 591.
[13] *Ex parte* Railroad Co., 95 U. S. 221.
[14] The Lucille, 19 Wall. 73.
[15] Collum *v.* Eager, 2 How. 61; Verden *v.* Coleman, 18 How. 86; Gibbons *v.* Ogden, 6 Wh. 448.

the adjustment of priorities of creditors and conflicting interests in a bankrupt's estates, taken on appeal to the circuit court, under the provisions of the late Bankrupt Act.[1]

We have observed that on appeal from the district court in admiralty to the circuit court,[2] that court must render a judgment as though the suit had been instituted in that court. The same is true in case of appeals from the decisions of the district court sitting in equity, or where the circuit court reviews the decision of a district court on the law side of it by a writ of error.[3] Hence, where there was a decree in the circuit court reversing a decree for the foreclosure of a mortgage in the district court, and remanding the case to the latter court, this was held not a final decree, from which an appeal could be taken to this court.[4]

But where an order was made for the sale of real estate, and afterwards a decree was made confirming the sale, it was held that an appeal lay from this final decree.[5]

Where there was a decree in chancery in the circuit court, in which there was a reference to a master to ascertain the amount of damages sustained by the plaintiff for an infringement of a patent right by the defendant, and the decree perpetually enjoined the further use of it by the defendant, but did not decree the payment of costs, they and all other questions in the cause being reserved until the coming in of the report of the referee, it was held that this was not a final decree from which an appeal would lie to this court.[6]

The decree must be filed in order to give jurisdiction on appeal. Therefore where a decree was made in admiralty that a sum of money was due, but the amount was not determined at the time of the appeal and no order made for its payment, it was held on appeal that this was not a final decree from which an appeal could be taken, and that it could not be cured by any amendment in the Supreme Court.[7] But where a decree decided the rights of litigants

[1] Hall *v.* Allen, 12 Wall. 452.

[2] See section 631 of the Rev. Stat.

[3] See section 632 of the Rev. Stat.

[4] Moore *v.* Robins, 18 Wall. 588; Davis *v.* Crouch, 94 U. S. 514. See also Zeller *v.* Switzer, 91 U. S. 487; Parcels *v.* Johnson, 20 Wall. 653; Brown *v.* Union Bk., 4 How. 465; Pepper *v.* Dunlap, 5 How. 51; Tracy *v.* Holcomb, 24 How. 426.

[5] Sage *v.* Railroad Co., 96 U. S. 712; Butterfield *v.* Usher, 91 U. S. 247

[6] Bernard *v.* Gibson, 7 How. 650. Suits at law can only be brought to the Supreme Court by a writ of error, and not by appeal: Sarchet *v.* United States, 12 Pet. 143; Parish *v.* Ellis, 16 Pet. 451; United States *v.* Goodwin, 7 Cr. 108.

[7] Montgomery *v.* Anderson, 21 How. 336.

to the property in controversy, and entitled the complainant to have it carried into execution, but left certain accounts to be adjusted between the parties in pursuance of the decree, this was held to be appealable.[1] So a decree entered at chambers for the foreclosure of a mortgage and a sale of the mortgaged property pursuant to a power contained in a mortgage importing a confession of judgment on non-payment, and under a proceeding in Louisiana called "executory process," was held to be a final decree and appealable.[2] So where a decree was made setting aside certain deeds as fraudulent and void, and that certain lands and slaves be delivered up to the complainant, and that the master should take and report an account of the rents and profits of the lands and slaves and of certain money and notes, retaining the bill for this latter purpose, this was held to be a final decree from which an appeal could be taken, as the determination of the question of title to the land and slaves was a final one within the meaning of the statute.[3]

But appeals cannot be taken from merely interlocutory orders;[4] or from the decision of a court as to the terms on which an amendment will be allowed on sustaining a demurrer to a bill;[5] or from the decision of a court adjusting priorities and conflicting interests in a bankrupt's estate;[6] or from a decree reversing a decree in the court below for the foreclosure of a mortgage and remanding the cause back for a new trial.[7]

Where there is an appeal from the district to the circuit court in an admiralty case the decree of the former is practically vacated, and the proceeding in the later is *de novo*, as though no trial had been in the district court, and a new decree should be made. Therefore a decree of the circuit court in such a case merely affirming the decree of the district court is not such a decree as should be rendered, and an appeal therefrom cannot be taken.[8] But an

[1] Thompson *v.* Dean, 7 Wall. 342. But a decree awarding a permanent injunction to restrain infringements of a patent, and for an account and a reference to a master to take and state the same and report thereon, was held not to be appealable: Humiston *v.* Stanthorp, 2 Wall. 106; Bernard *v.* Gibson, 7 How. 650.

[2] Marin *v.* Lalley, 17 Wall. 14. See also Bronson *v.* Railroad Company, 2 Black 524; Whiting *v.* Bank of U. S., 13 Pet. 15.

[3] Forgay *v.* Conrad, 6 How. 201.

[4] Forgay *v.* Conrad, 6 How. 201. See also *Ex parte* Cutting, 94 U. S. 14.

[5] Sheets *v.* Seldon, 7 Wall. 416.

[6] Hall *v.* Allen, 12 Wall. 452; Morgan *v.* Thornhill, 11 Wall. 65; Mead *v.* Thompson, 15 Wall. 635.

[7] Moore *v.* Robbins, 18 Wall. 588; Tracy *v.* Holcomb, 24 How. 426; Brown *v.* Union Bank, 4 How. 465.

[8] The Lucille, 19 Wall. 73. See *ante*, § 307.

appeal will lie from a decree of the circuit court confirming a sale made by its previous order, and which disposes of the whole matter of the suit.[1]

§ 308. **Time for review limited.**—The time within which a writ of error may be prosecuted or an appeal taken in a civil action at law or in equity is limited to two years after the entry of the judgment, decree or order, except where the party entitled to prosecute a writ of error or to take an appeal is an infant, or insane, or imprisoned, in which case the writ may be prosecuted or the appeal taken within two years after the judgment, decree or order is entered, exclusive of the term of such disability.[2] The writ of error must be brought or the appeal taken within two years, except in the cases above stated; and a writ of error is not brought, within the meaning of the statute, until it is filed in the court where the judgment, decree or order was entered. It is not sufficient that the writ is tested or issued within the time limited, but all the steps necessary for the perfecting of the right to a writ or an appeal, on the part of the party desiring a review of the decision, must be taken.[3] The language of the section of the Revised Statutes just cited is that "no judgment, decree or order of a circuit or district court in any civil action at law or in equity shall be reviewed in the Supreme Court on writ of error or appeal, unless the writ of error is brought or the appeal taken within two years after the entry of such judgment, decree or order," etc. The entry of a "judgment, decree or order" here referred to has been construed to mean such a one as substantially disposes of the whole case, and not a mere preliminary, discretionary or incidental judgment, or an interlocutory order or decree, which does not thus dispose of the matter in controversy.[4]

§ 309. **Want of jurisdiction apparent of record.**—If it is apparent on the record that this court has no jurisdiction of an appeal, it will dismiss it without any motion for that purpose, and even if both parties should oppose it;[5] and in such a case an appellant may of

[1] Sage *v.* Railroad Company, 96 U. S. 712; Blossom *v.* Railroad Company, 1 Wall. 655; Butterfield *v.* Usher, 91 U. S. 246.

[2] Rev. Stat. § 1008.

[3] Brooks *v.* Norris, 11 How. 204. Objection may be taken by motion: Id. A rebellion in the state where the court sits suspends the limitations during its continuance: The Protector, 9 Wall. 687.

[4] Forgay *v.* Conrad, 6 How. 201; Whitney *v.* Bank of U. S., 13 Pet. 15; Michoud *v.* Girod, 4 How. 503.

[5] See *ante*, § 358; Gruner *v.* United States, 11 How. 163; Sampson *v.* Welsh, 24 How. 207; The Lucy, 8 Wall. 307; Merrill *v.* Petty, 16 Wall. 338.

course have it dismissed on motion therefor, even though it be resisted by the appellee.[1] And where the Supreme Court has once reviewed a case, and a mandate has been issued and a judgment entered in the circuit court in accordance with such mandate, an appeal therefrom will be dismissed with costs, on motion of the appellee, as a matter of course.[2] If an appeal has been once dismissed, it cannot be redocketed without a new appeal;[3] and if an appeal is not allowed in open court at the term at which it was rendered, it will be dismissed, where no citation has been issued and the appellee does not appear.[4]

§ 310. **Right of the appellant to dismiss an appeal.**—An appellant has the right to dismiss his appeal, and this right could be exercised at any time before the submission of the cause, unless the adverse party should also appeal; and even though resisted by the other side.[5]

§ 311. **When dismissed of course.**—If an appeal is not allowed in open court at the term at which the decree was rendered, and no citation has been issued, the appeal will be dismissed, even though the appellee does not appear;[6] and the appeal from a decree of the circuit court entered in accordance with a mandate of this court will of course be dismissed on motion of the appellee, as the matter, having once been determined by the court, could not be reheard and redetermined in this way.[7]

§ 312. **Review of decisions on certificate of division.**—This court has further power to review the final judgments or decrees of the circuit courts in any civil suit or proceeding before them which was held by a circuit justice and a circuit judge or a district judge, wherein the said judges certify, as provided by law, that their opinions were opposed upon any question which occurred on the trial of said suit or proceeding. In such a case the judgment or decree may be affirmed, reversed or modified by the Supreme Court, on writ of error or appeal, according to the nature of the case, and subject to such provisions of the law as are applicable in other cases of writs of error or appeals, in regard to bail and supersedeas.[8]

[1] Latham's Appeal, 9 Wall. 145.
[2] Stewart *v.* Salamon, 97 U. S. 361.
[3] Rogers *v.* Law, 21 How. 526.
[4] Vansant *v.* Gaslight Co., 99 U. S. 213.
[5] Latham's Appeal, 9 Wall. 145.
[6] Vansant *v.* Gaslight Co., 99 U. S. 213.
[7] Stewart *v.* Salamon, 97 U. S. 361. A cause dismissed under a rule of court cannot, at a subsequent term, be redocketed without a new appeal: Rogers *v.* Law, 21 How. 526.
[8] Rev. Stat. § 693. See also Rev. Stat. § 652.

It is further provided: "When any question occurs on the hearing or trial of any criminal proceeding before a circuit court, upon which the judges are divided in opinion, and the point upon which they disagree is certified to the Supreme Court according to law, such point shall be finally decided by the Supreme Court; and its decision and order in the premises shall be remitted to such circuit court, and there entered of record, and shall have effect according to the nature of the said judgment and order."[1]

It is further provided in such cases that imprisonment shall not be allowed or punishment inflicted where the judges are divided in opinion upon the question touching the imprisonment or punishment.[2] This would, of course, be limited to the time when this court should determine the question.

§ 313. **The specific point of law must be stated.**—By section 652 of the Revised Statutes, relating to the same subject in civil cases, it is provided that where "any question has occurred upon which the opinions of the judges were opposed, the point upon which they so disagreed shall, during the same term, be stated under the direction of the judges and certified, and such certificate shall be entered of record."

Under the provisions of these sections it has been held necessary to state the particular point of disagreement. It is not sufficient to certify that the judges were divided in opinion as to which party was entitled to a decree;[3] nor that they disagreed *pro forma* in order to take the opinion of this court;[4] but there must be an actual division of opinion upon a question of law duly certified. It must arise during the trial of a cause, and not be a mere incidental or collateral question arising after the judgment or decree.[5] This court will not, as a general rule, consider several questions that arose at different stages of the trial and relate to independent points.[6] But where the several questions require an opinion virtually and substantially on one point, and this is shown by the questions pre-

[1] Rev. Stat. § 697.

[2] Rev. Stat. § 651.

[3] Sadler *v.* Hover, 7 How. 646; Wolf *v.* Usher, 3 Pet. 269.

[4] Webster *v.* Cooper, 10 How. 54; Nesmith *v.* Sheldon, 6 How. 41; United States *v.* Stone, 14 Pet. 524. But see an exception, Jones *v.* Van Zant, 5 How. 224.

[5] Daniels *v.* Railroad Company, 3 Wall. 250.

[6] United States *v.* Bailey, 9 Pet. 267; Nesmith *v.* Sheldon, 6 How. 43; White *v.* Turk, 12 Pet. 238; United States *v.* Stone, 14 Pet. 524; Saunders *v.* Gould, 4 Pet. 392; Grant *v.* Raymond, 6 Pet. 218.

sented, and the decision of this one may dispose of all of them, this court will decide the point.[1]

If a certificate of division is brought to this court, only the points certified are before the court; and the cause may be proceeded with in the circuit court, in its discretion, as though no certificate had been sent up;[2] and the determination of the question here does not affect the right to bring up the case by appeal or writ of error, after the case has been determined in the court below.[3]

§ 314. **The question must be one of law and not of discretion.**—The particular points of difference in opinion should be clearly and distinctly presented, and these must involve questions of law and not of fact,[4] and not matters which rest solely in the discretion of the court below;[5] and the authority of the Supreme Court in such cases is strictly limited to the precise questions thus presented.[6]

But the court will, as we have noticed, entertain jurisdiction even where the division of opinion arises on a preliminary motion, if it involves the merits of the case, and several questions may be certified up if they involve substantially one point and arose at one time.[7] But it is otherwise if they arose at different stages of the trial and relate to independent matters. And the court will not take cognizance of a cause upon a certificate of division where the whole case has been sent up for the opinion of this court.[8] Appropriate forms for certificates of division in criminal cases may be found *post*, No. 195; in civil cases, No. 259.

§ 315. **Certificate of division in criminal cases.**—The same general principles of construction are applicable in cases of certificates of disagreement in criminal cases, under section 697 of the Revised Statutes, as under section 693 in civil cases.

In such cases this court will not act upon a certificate of division

[1] United States *v.* Chicago, 7 How. 185; Leland *v.* Wilkinson, 10 Pet. 294.

[2] Kennedy *v.* Bank of Georgia, 8 How. 586.

[3] Ogle *v.* Lee, 2 Cr. 33; United States *v.* Stone, 12 Pet. 524.

[4] Dennistoun *v.* Stewart, 17 How. 565; Kennedy *v.* Bank, 8 How. 610; United States *v.* City Bank, 19 How. 385; Daniels *v.* Railroad Company, 3 Wall. 250; Silliman *v.* Hudson River Company, 1 Black 582.

[5] Wiggins *v.* Gray, 24 How. 303; Smith *v.* Vaughn, 10 Pet. 366; Packer *v.* Nixon, 10 Pet. 411; Davis *v.* Braden, 10 Pet. 288.

[6] Ward *v.* Chamberlain, 2 Black 430.

[7] United States *v.* City of Chicago, 7 How. 185; Leland *v.* Wilkinson, 10 Pet. 294.

[8] United States *v.* Bailey, 9 Pet. 267; White *v.* Turk, 12 Pet. 238; United States *v.* Stone, 14 Pet. 524; Saunders *v.* Gould, 4 Pet. 392; Grant *v.* Raymond, 6 Pet. 218; Nesmith *v.* Sheldon, 6 How. 43.

on a motion for a new trial,[1] or to quash an indictment,[2] or to dismiss the prosecution for want of jurisdiction of the court,[3] or on a demurrer containing several grounds of objection,[4] or on a motion to instruct the jury, that the evidence did not conduce to establish the offence under which the indictment was framed, where the whole case is transferred to this court.[5]

The reason for the rule in the latter case will be manifest when it is considered that this court, in such a case, would be called to pass upon the law and the facts of the case; and if against the prisoner it might be brought again to this court on a writ of error, for a reconsideration of the same question. But on a point relating to a motion in arrest of judgment, this court will take jurisdiction of a certified division of opinion, as it is a question arising during the trial.[6]

For form of certificates of division, see *post*, Nos. 195, 259.

§ 316. **When the Supreme Court is divided in opinion.**—If there are questions duly certified to this court on a division of opinion of the judges of a circuit court, and the judges of this court are also divided in opinion upon the questions presented, the case will be remitted to the circuit court for such further action as may be required by law and the rules of such court. If there are several questions, and one of them relates to the jurisdiction of the court below, this will be first determined; for if determined against its jurisdiction, it would dispose of the others. If a cause is remitted in such a case it is the established rule for the court below to dismiss the cause, and a decree or judgment to that effect should be entered, so that the aggrieved parties may, if they desire, bring the questions to this court for review, by appeal or writ of error, as the case may require.[7]

§ 317. **Appeals in prize causes.**—It is provided by section 695 of the Revised Statutes as follows: "An appeal shall be allowed to

[1] United States *v.* Daniel, 6 Wh. 542.

[2] United States *v.* Rosenburgh, 7 Wall. 580; United States *v.* Wilson, 7 Pet. 150; United States *v.* Reid, 12 How. 361.

[3] United States *v.* Avery, 13 Wall. 251.

[4] United States *v.* Briggs, 5 How. 208; United States *v.* Bradley, 9 Pet. 267.

[5] United States *v.* Bailey, *supra.*

[6] United States *v.* Tyler, 7 Cr. 284.

[7] Silliman *v.* Hudson River Bridge Co., 1 Black 582; Hannaur *v.* Woodruff, 10 Wall. 482. The jurisdiction in such cases is not limited by the amount in controversy: Dow *v.* Johnson, 100 U. S. 158. A division of opinion between a judge, associate justice and a circuit judge may be taken up on a certificate of division of opinion: Insurance Co. *v.* Dunham, 11 Wall. 1; Weyauwega *v.* Ayling, 99 U. S. 112.

the Supreme Court from all final decrees of any district court in prize causes, where the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars, and shall be allowed without reference to the value of the matter in dispute on the certificate of the district judge that the adjudication involves a question of general importance. And the Supreme Court shall hear and determine such appeals, and shall always be open for the entry thereof."

We have seen that under the preceding provisions of the statutes for allowing writs of error and appeals the decision must be final and dispose of the whole matter so far as the appellant is concerned.[1] Where the United States filed several libels for condemnation, as prize of war, of a large quantity of cotton and other captured property, and on motion these were consolidated and various claims were interposed in the consolidated suit for portions of the libelled property, among which was one by parties who denied the validity of the capture and insisted on the title and the right to a portion of the cotton, but upon the hearing in the district court an order was made dismissing the claims with costs, and the claimants appealed therefrom, it was held, upon a motion to dismiss the appeal in this court on the ground that the decree was not final, that, so far as these appellants and the United States were concerned, it was a final judgment, leaving nothing to be litigated between them, and that the court had jurisdiction thereof.[2]

§ 318. **Time of appeal in prize cases.**—In prize cases the time for appeals is more limited. The statute provides in such cases as follows: "Appeals in prize causes shall be made within thirty days after the rendering of the decree appealed from, unless the court previously extends the time, for cause shown in the particular case; *provided*, that the Supreme Court may, if in its judgment the purposes of justice require it, allow an appeal in any prize cause, if it appears that any notice of appeal, or intention to appeal, was filed with the clerk of the district court within thirty days next after the rendition of the final decree therein."[3]

[1] See *ante*, §§ 295, 304.

[2] Withenbury *v.* United States, 5 Wall. 819; The Admiral, 3 Id. 603. Where this court will remand a cause to the district court, see United States *v.* Weed, 6 Wall. 62; The Watchful, Id. 91. A technical objection will not be entertained in this court, where it is not raised in the court below: Jecker *v.* Montgomery, 18 How. 111.

[3] Rev. Stat. § 1009; The Neustra Senora de Regla, 17 Wall. 29.

The statute further provides that "appeals from the circuit courts, and district courts acting as circuit courts, and from district courts in prize causes, shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error."[1]

§ 319. **Appeals cannot be taken in the name of a steamboat or a partnership.**—An appeal must be taken in the name of some person. An inanimate object, like a steamboat or other vessel, has no capacity to prosecute legal proceedings or to take an appeal, even where the proceedings are in admiralty and *in rem*.[2]

Nor can an appeal be taken in a partnership name where the record does not set forth the names of the parties to it. The doctrine is the same in this respect whether the proceeding is by writ of error or appeal, or in equity, admiralty or prize cases. In all these cases the names of the individual parties to the suit or proceeding must be stated, and where the interest is joint, as we have already seen, all those on the same side must join in the appeal. Where in admiralty the appeal was taken by and in the name of "William A. Freeborn & Co.," this court, on motion to dismiss for want of jurisdiction, sustained the motion and refused to allow the appellant to amend the petition of appeal, citation, bond or the libel.[3] So where, in a writ of error, the parties were described as Holliday *et al. v.* Boston *et al.*, the same rule was applied.[4]

§ 320. **Writs of error and appeals, without reference to amount.**—Section 699 of the Revised Statutes provides: "A writ of error may be allowed to review any final judgment at law, and an appeal shall be allowed from any final decree in equity hereinafter mentioned, without regard to the sum or value in dispute:

"*First.* Any final judgment at law or final decree in equity of any circuit court, or of the supreme court of the District of Columbia, or of any territory, in any case touching *patent rights* or *copyrights*.

"*Second.* Any final judgment of a circuit court, or of any district

[1] Rev. Stat. § 1012; Yeaton *v.* Lenox, 7 Pet. 220; The Protector, 11 Wall. 82.

[2] Steamboat Burns, 9 Wall. 237.

[3] The Protector, 11 Wall. 82. See also Smith *v.* Clark, 12 How. 21; Owings *v.* Kincannon, 7 Pet. 399; Porter *v.* Foley, 21 How. 393; Hodge *v.* Williams, 22 How. 87; Williams *v.* Bank, 11 Wh. 414.

[4] Holliday *v.* Boston, 4 How. 645. See also Deneale *v.* Stump, 8 Pet. 526; Wilson *v.* The Life and Trust Ins. Co., 12 Pet. 140; Davenport *v.* Fletcher, 16 How. 142.

court acting as a circuit court, in any civil action brought by the United States for the enforcement of any *revenue law* thereof.

"*Third.* Any final judgment of a circuit court, or of any district court acting as a circuit court, in any civil action against any *officer* of the revenue for any act done by him in the performance of his official duty, or for the recovery of any money exacted by or paid to him which shall have been paid into the treasury.

"*Fourth.* Any final judgment at law or final decree in equity of any circuit court, or of any district court acting as a circuit court, in any case brought on account of the deprivation of any *right*, *privilege* or *immunity* secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States.

"*Fifth.* Any final judgment of a circuit court, or of any district court acting as a circuit court, in any civil action brought by any person on account of injury to his person or property by any act done in furtherance of any *conspiracy* mentioned in section 1980, title 'Civil Rights.'

"Suits under this provision are reviewable by the Supreme Court under the same conditions and regulations as are now provided by law for the review of other causes in said court."[1]

§ 321. **Cases not embraced in this statute.**—The first clause of the foregoing section does not cover the case of a bill in equity to enforce the specific performance of a contract between parties relating to a patent right or a copy-right. And where the suit is brought to restrain the fraudulent violation of such a contract, this court has no appellate power under the provisions of said clause, and cannot entertain jurisdiction of a writ of error or appeal in such a case unless it is made to appear that the matter in controversy exceeds five thousand dollars.[2]

So the second clause of said section was held not to embrace an action brought against a collector of a port of entry to recover back duties alleged to have been illegally exacted by him and paid under protest.[3] Such a case is not within the letter of this clause, which provides only for a review of final judgments in civil actions brought

[1] Act of March 1, 1875, ch. 114, § 5, 18 Stat. 337.

[2] Brown *v.* Shannon, 20 How. 55. See also Wilson *v.* Sandford, 10 Id. 99; Philip *v.* Nock, 13 Wall. 185. This clause relates only to cases which involve a construction of the patent laws and the rights of patentees under them: Sizer *v.* Many, 16 How. 98.

[3] Mason *v.* Gamble, 21 How. 390.

by the United States. If the suit is brought to enforce the revenue laws, this court may take cognizance of the cause on a writ of error, without regard to amount.[1]

The general observations heretofore made in reference to the nature and finality of decisions which may be reviewed would be equally applicable under the provisions of this statute.[2]

§ 322. **Cases tried without a jury; bill of exceptions.**—It is provided by section 649 of the Revised Statutes that issues in civil causes may be tried in the circuit court without the intervention of a jury, whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury; and that the finding of facts, whether general or special, shall have the same effect as the verdict of a jury.[3] And section 700 provides that when such issues are thus tried, "the rulings of the court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment."

§ 323. **General and special finding of facts.**—In case the finding is special, under the provisions of the foregoing section it should be of ultimate facts and not a mere report of the evidence in the case. It must be a finding of certain fact propositions which the court believes to be established by the evidence, and not the evidence on which those conclusions rest. If the finding is general, it usually includes mixed questions of law and fact, in which case it is conclusive upon both; and whether general or special, it has the same effect as the verdict of a jury, and consequently is conclusive of the facts found. If there is a general verdict, there can be no review in this court except on a bill of exceptions taken to the ruling of the court on some question of law. But if the verdict is special, the question would be presented by the record whether the facts thus found require a judgment for the plaintiff or defendant,

[1] Petigrew *v.* United States, 97 U. S. 385; United States *v.* Bromley, 12 How. 88.

[2] See *ante*, § 303, *et seq.*; Wilson *v.* Sandford, 10 How. 99. A ruling of the court on a matter in its discretion is not a final decree within the meaning of the statute: Dean *v.* Mason, 20 How. 198; Jones *v.* Morehead, 1 Wall. 155; Canton *v.* American Ins. Co., 3 Pet. 307.

[3] This section was not repealed by the act of March 3, 1875, ch. 137, § 3, 18 Stat. 471; Phillips *v.* Moore, 100 U. S. 208.

as a matter of law, and this court could review it on the record without a bill of exceptions.[1]

Although the issues of fact in any civil case may be tried and determined by the court without the intervention of a jury, and the court may find upon the facts, either general or special, there is nothing making it the imperative duty of the court to find either way; and if the court chooses to find generally for one side or the other, the losing party has no redress on error or appeal, except for errors in the admission or rejection of evidence, duly excepted to at the time and brought before this court by a bill of exceptions.[2]

To entitle a party to a judgment on the special findings of the court, they should cover all the essential facts, which must exist and concur to constitute a right of recovery.[3]

§ 324. Writ of error upon an agreed case.—It is the well-established practice in this country, and especially in the federal courts, to take the judgment of the court upon a case stated, or an agreed statement of facts. In such cases it is usual for counsel representing their clients to sign the statement, which becomes a part of the record of a cause, and a writ of error will lie from a decision thereon, if it is an agreement of ultimate facts, and not the mere evidence of the facts. In this respect it is in the nature of a special verdict.

Like a special verdict, if it is ambiguous or imperfect, if it contains only the evidence of facts and not the facts themselves, or contains only a part of the facts in issue essential to be shown,[4] and is silent as to others, this court will remand the case for a new trial.[5] There would in such a case be nothing from which the court could

[1] Norris *v.* Jackson, 9 Wall. 125; Burr *v.* Des Moines Co., 1 Id. 99; Insurance Co. *v.* Tweed, 7 Id. 44; Graham *v.* Bayne, 18 How. 62; Barnes *v.* Williams, 11 Wh. 415; Suydam *v.* Williamson, 20 How. 432; Cucullu *v.* Emmerling, 22 Id. 83; Copelin *v.* Ins. Co., 9 Wall. 461; Coddington *v.* Richardson, 10 Id. 516.

[2] Dirst *v.* Morris, 14 Wall. 484; Town of Ohio *v.* Marcy, 18 Id. 552; Insurance Co. *v.* Folsom, 18 Id. 237; Miller *v.* Insurance Co., 12 Id. 297; Norris *v.* Jackson, 9 Id. 125; Copelin *v.* Insurance Co., Id. 461; Tancred *v.* Christy, 12 M. & W. 323; Bond *v.* Brown, 12 How. 254; Hyde *v.* Boorman, 16 Pet. 176; United States *v.* King, 7 How. 853.

[3] Smith *v.* Sac County, 11 Wall. 139. See also Copelin *v.* Insurance Co., 9 Wall. 461; Insurance Co. *v.* Tweed, 7 Wall. 44; Coddington *v.* Richardson, 10 Wall. 516; Norris *v.* Jackson, 9 Wall. 125; Flanders *v.* Tweed, 9 Wall. 425; Jennisons *v.* Leonard, 21 Wall. 302; Fleitas *v.* Cockrem, 100 U. S. 301; Gilman *v.* Illinois & M. T. Co., 91 U. S. 603.

[4] Norris *v.* Jackson, 9 Wall. 125; Insurance Co. *v.* Tweed, 7 Wall. 44.

[5] Graham *v.* Bayne, 18 How. 60; Prentice *v.* Zane, 8 How. 481; Burr *v.* Des Moines Co., 1 Wall. 99.

determine whether the judgment is consistent with the facts. But where the ultimate facts relating to the points in issue are properly admitted in the court below, the judgment of the court below, based upon such stated case, may be here reviewed on a writ of error, without a bill of exceptions.[1]

§ 325. **Writs of error and appeals from other courts.**—The statute further provides for the review of final judgments of the supreme court of any territory except the territory of Washington, where the value of the matter in dispute, exclusive of costs, exceeds one thousand dollars, in the same manner and under the same regulations as the decisions of a circuit court may be reviewed; and that any final judgment or decree of the supreme court of Washington territory, where the value of the matter in dispute exceeds two thousand dollars, exclusive of costs, may be reviewed in like manner, in any case where the Constitution or a statute or treaty of the United States is brought in question.[2] And such appeal or writ of error may be taken within the time and in the manner provided by law, although such territory may have been admitted as a state after the judgment or decree was rendered; and the Supreme Court is required to direct the mandate in such cases to such court as the nature of the case requires.[3]

"When any territory is admitted as a state, and a district court is established therein, the said district court shall take cognizance of all cases which were pending and undetermined in the superior court of such territory, from the judgments or decrees to be rendered in which writs of error could have been sued out or appeals taken to the Supreme Court, and shall proceed to hear and determine the same."[4]

In such cases the judgments or decrees of the district court may be reviewed in this court on writs of error or appeal, in the same manner and with the same effect as if such judgments or decrees had been rendered in the superior court of such territory; and mandates and writs necessary to the exercise of appellate jurisdiction in

[1] Stimpson *v.* Railroad, 10 How. 329; United States *v.* Eliason, 16 Pet. 291; Ingle *v.* Coolidge, 2 Wh. 363; Miller *v.* Nichols, 4 Wh. 311; Shankland *v.* Washington, 5 Pet. 390.

[2] Rev. Stat. § 702, as amended by act February 27, 1877, ch. 69, 19 Stat. 241. See also Rev. Stat. §§ 1909, 1911.

[3] Rev. Stat. § 703. The provisions of these sections were extended to the territory of Utah, by an act of June 23, 1874, 18 Stat. 254. See also Rev. Stat. § 704.

[4] Rev. Stat. § 569. See also §§ 567, 568.

such cases must be directed to such district judge, who is required to obey the same.[1]

In like manner may the final judgments or decrees of the supreme court of the District of Columbia be reviewed, and under the same regulations as are provided in cases of writs of error or appeals from circuit courts, where the value of the matter in controversy, exclusive of costs, exceeds the sum of twenty-five hundred dollars.[2]

If, however, in the latter case the value of the matter in dispute, exclusive of costs, exceeds one hundred dollars but is less than twenty-five hundred dollars, and either party desiring a review of the cause presents a petition in writing to any justice of the Supreme Court, accompanied by a copy of the proceedings complained of, and an assignment of errors, and he is of opinion that such errors involve questions of law of such extensive operation as to render a decision upon them by the Supreme Court desirable, he may allow the writ of error or appeal, by a written order, to the clerk of the supreme court of said district, directing him to issue the writ of error or allow the appeal.[3] But even in such a case, if there is no principle of law of extensive application involved in the case, the appeal will be dismissed,[4] and if the judgment was for less than one hundred dollars the defendant is not entitled to a writ of error, although the amount claimed was for a larger sum.[5]

§ 326. **Appeals from the Court of Claims.**—The United States may also take an appeal from any judgment of the Court of Claims adverse to the United States, and the plaintiff may also appeal in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of the said court as provided by section 1089.[6] Appeals must be taken within ninety days after the rendition of the judgment, and the procedure is regulated by the rules for the Court of Claims promulgated by the Supreme Court.[7]

§ 327. **Judgments and decrees of state courts upon a writ of error.**—The section of the Revised Statutes providing for a review and

[1] Rev. Stat. § 704. For construction of this section, see Forsyth *v.* United States, 9 How. 571; McNulty *v.* Batty, 10 How. 72.

[2] Rev. Stat. § 705, as amended by act of February 25, 1879, ch. 99, § 4, 20 Stat. 321.

[3] Rev. Stat. § 706, as amended by act of February 25, 1879, ch. 99, § 4, 20 Stat. 321.

[4] Campbell *v.* Read, 2 Wall. 198.

[5] Wise *v.* Columbia Turnpike Co., 7 Cr. 276.

[6] Rev. Stat. § 707; Id. § 1089.

[7] Rev. Stat. § 708. See *post* for the Court of Claims Rules.

re-examination of the judgments and decrees of state courts is as follows: "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity: or where any title, right, privilege or immunity s claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States, and the proceedings upon the reversal shall be the same, except that the Supreme Court may at their discretion proceed to a final decision of the case, and award execution or remand the same to the court from which it was so removed. The Supreme Court may reverse, modify or affirm the judgment or decree of such state court, and may at their discretion award execution, or remand the same to the court from which it was removed by the writ." [1]

The authorities referred to in considering the jurisdiction of the Supreme Court on writs of error to and appeals from the circuit courts, and the observations there made in reference to the construction of the language "final judgment or decree" used in the section relating to those cases, are equally applicable to this one.[2]

There is, however, at least one important difference in the provisions of the two sections. The former only provides for a review of the final decisions of circuit courts in *civil cases*, while the latter statute makes no limitation in respect to the character or subject-matter of the suit. If there could have been any question concerning the appellate jurisdiction of this court in criminal cases under the provisions of the Judiciary Act, it would appear to be settled by the provision

[1] Rev. Stat. § 709. See Rev. Stat. § 1017; act of February 18, 1875.

[2] See *ante*, § 303.

of section 710 of the Revised Statutes,[1] which provides as follows: "Cases on writs of error to reverse the judgment of a state court in any criminal case shall have precedence, on the docket of the Supreme Court, of all cases to which the government of the United States is not a party, excepting only such cases as the court, in its discretion, may decide to be of public importance."[2]

§ 328. **Writs of error to state courts; not of right.**—Writs of error to the state courts are issued in the same manner and under the same regulations, and have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States;[3] but they are not allowed as of right. The practice is to submit the record of the state court to a justice of the Supreme Court, who upon examination of it determines whether any question was made or decided in the state court which is cognizable by this court, and whether there is a case made by the record to justify the allowance of the writ.

If the decision appears to involve a question that gives the court jurisdiction, it is generally allowed; but if no such question appears to have been made or decided in the court below, or where, although a claim of right under the Constitution or laws of the United States was made, yet it is clear that the jurisdiction of the court does not extend to the case presented, the writ will not be allowed.[4]

But any act, from whatever source originating, to which the state gives the sanction and the force of a law is within the meaning of the statute providing that a judgment or decree of a state court may be re-examined by this court, "where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity." If a state recognizes a statute as legal, though in fact it may not be so, this becomes an act and a statute of the state within the meaning of the provision under consideration; and

[1] This provision was embraced in an act of Congress, July 13, 1866, ch. 184, § 69. 14 Stat. 172.

[2] Twitchell *v.* The Commonwealth, 7 Wall. 321; Cohens *v.* Virginia, 6 Wh. 264; Worcester *v.* Georgia, 6 Pet. 515.

[3] Rev. Stat. § 1003.

[4] Twitchell *v.* The Commonwealth, 7 Wall. 321; Gleason *v.* Florida, 9 Wall. 779; Bartemeyer *v.* Iowa, 14 Wall. 26; Barron *v.* The City of Baltimore, 7 Pet. 243; Fox *v.* Ohio, 5 How. 434; Smith *v.* Maryland, 18 How. 76; Withers *v.* Buckley, 20 How. 90.

if the question is presented to a state court, whether such "statute or authority exercised under any state" is void on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of the validity of the statute or authority, a writ of error lies to revise the decision of the state court.[1]

For various forms on writ of error and appeal, see *post*, No. 236, *et seq.*

§ 329. **A proper question must be presented by the record.**—In order to confer jurisdiction upon this court to review, on a writ of error, the final decision of the highest state court, it must appear in the record certified to this court that a federal question was presented to the court below; that is, it should clearly appear, either that there was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and that the decision was against its validity, or the validity of a statute of, or an authority exercised under, any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity; or that some title, right, privilege or immunity was claimed under the Constitution, or some treaty, statute of or commission held or authority exercised under the United States, and the decision was against the title, right, privilege or immunity specially set up or claimed by the plaintiff in error. If the record fails to show this, the writ will be dismissed for want of jurisdiction.[2] If the question presented is one of prescription, or of discretion in refusing to grant a motion for a new trial, or a rehearing in an equity suit, or whether a statute is repugnant to the constitution of the state, there is involved no federal question, and a writ of error to review a final judgment of the highest state court thereon will be dismissed.[3]

§ 330. **A specific question must be presented by the record.**—The record must present a specific question or specific questions for review; and it is not sufficient that it state in a general way that

[1] Williams *v.* Bruffy, 96 U. S. 176. See also Ford *v.* Surget, 97 U. S. 594; The Binghamton Bridge, 3 Wall. 51; University *v.* People, 99 U. S. 309.

[2] Caperton *v.* Bowyer, 14 Wall. 216; Steines *v.* Franklin Co., Id. 15; Hamilton Co. *v.* Massachusetts, 6 Id. 636.

[3] Marqueze *v.* Bloom, 16 Wall. 351; Gibson *v.* Chauteau, 8 Wall. 314; Worthy *v.* The Commissioners, 9 Wall. 613; Northern Railroad *v.* The People, 12 Wall. 384; Reetor *v.* Ashley, 6 Id. 174; Furman *v.* Nichol, 8 Id. 56; Peek *v.* Sanderson, 18 How. 42; Bank *v.* McVeigh, 98 U. S. 332; Lange *v.* Benedict, 99 Id. 68.

"the charge of the court, the verdict of the jury and the judgment below are each against and in conflict with the Constitution and laws of the United States," but the specific clause in the Constitution, or the particular statute or act of Congress, should be indicated, that the court may determine not only what the claim is, but whether it was denied.[1]

Nor will this court entertain jurisdiction where it appears from the record that the judgment or decree of the court below may be well sustained upon other grounds than the one involved in the federal question presented, although there was error in the decision as to the latter.[2] But where the judgment or decree cannot be maintained on other grounds, and a federal question has been presented and the highest state court has decided against the right claimed by the plaintiff in error, this court will entertain jurisdiction of the case and re-examine the judgment below, and determine whether it was a proper one, and either reverse or affirm it.[3]

An annual license tax was imposed upon insurance companies located and having an office and doing business within a city, by an ordinance of the city. The question raised in the highest state court was whether such an ordinance was not repugnant to the Constitution of the United States, and the state court decided that it was not. This court held that a writ of error would lie from the decision.[4]

So an objection to the introduction of a deed as evidence for the want of a revenue stamp, required by the statutes of the United States, but which was admitted in evidence notwithstanding the objection,[5] was held to present a question as to the proper interpretation

[1] Maxwell *v.* Newbold, 18 How. 511; Wolf *v.* Stix, 96 U. S. 541; Mathews *v.* McStea, 6 Wall. 646; Messenger *v.* Mason, 10 Wall. 507; Edwards *v.* Elliott, 21 Wall. 532; Scott *v.* Jones, 5 How. 343.

[2] Kennebec Railroad *v.* Portland Railroad, 14 Wall. 23. See also Klinger *v.* Missouri, 13 Id. 257; Railroad Company *v.* Maryland, 20 Id. 643; Cockroft *v.* Vose, 14 Id. 5; Bank of West Tennessee *v.* Citizens' Bank, 14 Id. 9; Palmer *v.* Marston, Id. 10; Sevier *v.* Haskell, Id. 12; Smith *v.* Adsit, 16 Id. 185; Moore *v.* Mississippi, 21 Wall. 636.

[3] Murdock *v.* The City of Memphis, 20 Wall. 591; Armstrong *v.* Treasurer, 16 Pet. 281; Crowell *v.* Randall, 10 Id. 368; Cousin *v.* Blane, 19 How. 202; Grand Gulf R. Co. *v.* Marshall, 12 How. 165; Williams *v.* Norris, 12 Wh. 117; Brown *v.* Atwell, 92 U. S. 327; Rev. Stat. § 709.

[4] Home Insurance Co. *v.* City Council, 93 U. S. 116. See also Osborne *v.* Mobile, 16 Wall. 479; Cannon *v.* New Orleans, 20 Id. 577; Sevier *v.* Haskell, 14 Id. 15; McGuire *v.* The Commonwealth, 3 Id. 382; The License Cases, 5 Id. 462; Weston *v.* City Council, 2 Pet. 449.

[5] Hall *v.* Jordan, 15 Wall. 393.

of a United States statute;[1] and so the power of the court in bankruptcy under such statutes to order a sale of property in a particular case[2] was also held to present a proper federal question and to give the Supreme Court jurisdiction on a writ of error.

For form of writ of error to the state court, see *post*, No. 239.

§ 331. **Right of the United States to a writ of error.**—Where the United States is a party to a suit in a state court, it has the same right to a review by a writ of error, and no more than a private individual, and they are entitled to it under the same circumstances.[3]

§ 332. **Highest court of a state; construction.**—The statute provides for the removal of a cause by a writ of error in the cases specified, from the final judgment or decree of "the highest court of a state in which a decision in the suit could be had." It does not follow, therefore, that the decision sought to be reviewed should have been rendered by the highest court or court of last resort in the state; but it is only necessary that it be the court of last resort, or the highest court where a decision could be had in the particular case in which a review of the decision is desired. If there is a trial in a state court of original jurisdiction, and a federal question is presented, if there is no right of appeal therefrom to the highest court of review in the state for want of the sufficiency of the amount in controversy, or for any other cause, then the writ may issue to such state court of original jurisdiction, and the Supreme Court can take cognizance of the cause.[4] And this has been held to be proper where a party has a clear right to appeal from an inferior to a higher state court, but this right is unlawfully refused; in which case it has been held proper to send the writ to the former, and to hear and determine the cause when the record is properly certified from such court.[5]

There are other cases where the writ will issue to an inferior state court; and the letter of the law will not be permitted to destroy its spirit and purpose. Thus, where a cause involving a federal question has been duly passed upon and determined against the

[1] Gregory *v.* McVeigh, 23 Wall. 294.

[2] O'Brien *v.* Weld, 92 U. S. 81.

[3] United States *v.* Thompson, 93 U. S. 586. See also Dolman *v.* Insurance Co., 14 Wall. 666; Insurance Co. *v.* Hendren, 92 U. S. 287; Rockhold *v.* Rockhold, 92 U. S. 130.

[4] Miller *v.* Joseph, 17 Wall. 655.

[5] Gregory *v.* McVeigh, 23 Wall. 294; Downham *v.* Alexandria, 9 Wall. 659; Richmond, etc., R. Co. *v.* Railroad Company, 13 How. 80; Windsor *v.* McVeigh, 93 U. S. 274; Bryan *v.* Bates, 94 Mass. 201.

party insisting upon rights under federal laws, in the highest court of the state, and has been remanded to an inferior court of the state, requiring it to proceed in accordance with the opinion, and enter judgment there, the inferior court would in such a case be treated as the highest court of the state, and the writ of error would properly issue to it.[1]

In case the highest court of the state reverses the judgment or decree of the inferior court, and remands the cause for further proceedings, a writ issuing to the former for the purpose of reviewing a federal question would be dismissed;[2] mere reversal by the highest state court of the judgment or decree of an inferior court is not such a final judgment of the highest state court as is contemplated by the statute giving jurisdiction to the Supreme Court on writs of error to the state courts.[3]

§ 333. **What the certified record must contain.**—The record should clearly show that a proper federal question was presented, and in case a right, title, privilege or immunity was set up and claimed, it must appear that this was claimed by the plaintiff in error for himself and not for another, and that the decision was against him.[4]

It must further appear from the certified record that the state court decided the very case relied upon to give the Supreme Court jurisdiction;[5] and if it appears from the record that it was not necessary for the state court to pass upon the question, or that such a question was not in fact passed upon,[6] or that the decision rested upon the general principles of the law of nations, or upon a constitutional provision which merely declares a settled rule of jurisprudence,[7] this court will not take cognizance of the cause, but will dismiss the writ for the want of jurisdiction.[8]

§ 334. **Jurisdiction cannot be conferred by consent.**—It is a doctrine universally recognized that jurisdiction, either original or appellate, of federal courts cannot be conferred by consent. The

[1] Atherton *v.* Fowler, 91 U. S. 143.

[2] Davis *v.* Couch, 94 U. S. 514.

[3] McComb *v.* Commissioners, 91 U. S. 1; Tracy *v.* Holcomb, 24 How. 427; Parcels *v.* Johnson, 20 Wall. 654.

[4] Warfield *v.* Chaffe, 91 U. S. 690; Long *v.* Converse, Id. 105; Verden *v.* Coleman, 1 Black 472; Henderson *v.* Tennessee, 10 How. 311; Hale *v.* Gaines, 22 Id. 149.

[5] Cockroft *v.* Vose, 14 Wall. 5.

[6] Long *v.* Converse, 91 U. S. 105; Texas *v.* White, 7 Wall. 733; Huntingdon *v.* Texas, 16 Id. 412; Horn *v.* Lockhart, 17 Id. 580.

[7] Tennessee Bank *v.* Bank of Louisiana, 14 Wall. 9; Palmer *v.* Marston, Id. 10.

[8] New York Life Ins. Co. *v.* Hendren, 92 U. S. 286; Bethel *v.* Damaret, 10 Wall. 537.

jurisdiction of these courts is conferred by the Constitution and by acts of Congress, and is special and limited; and they have no jurisdiction except in the particular cases provided for them. Neither the consent of both parties nor of their counsel can give jurisdiction either of an original case or on appeal or writ of error, but the record must show the requisite facts conferring it.[1]

§ 335. **Constitutionality of state laws.**—If the question presented was whether a statute of a state was void on the ground of its repugnance to the Constitution of the United States, it must appear from the record that the decision was in favor of its validity, or the Supreme Court could not take cognizance of the case.[2] But if it is claimed that the legislature of a state had no authority to make the statute, or did not pass the statute involved in the controversy, this would not present a federal question which could be reviewed on a writ of error.[3]

§ 336. **Illustration of the application of the statute.**—The construction and application of the provision of the federal statute under consideration may be illustrated by a few recent cases. Thus, where the plaintiff in error sued upon certain notes, claiming that under a proper construction of the Constitution of the United States he was entitled to the payment thereof in gold and silver coin, and the decision of the court below was against his claim, this was held to be a proper case for review on a writ of error.[4]

So where the question presented was whether the mortgage of a vessel, duly recorded in pursuance of an act of Congress, gave a better lien than an attachment under the statute of a state, and the decision was that it did not, this was held reviewable on a writ of error.[5]

§ 337. **Claim under a statute, grant or treaty of the United States.**—If a title, right or privilege is claimed under a statute, grant or

[1] Mills *v.* Brown, 16 Pet. 525; Walker *v.* Taylor, 15 How. 64; Medberry *v.* State, 24 Id. 413; Murdock *v.* Memphis, 20 Wall. 590; Smith *v.* Adsit, 16 Id. 185.

[2] Walker *v.* Taylor, 5 How. 64; Commonwealth Bank *v.* Griffith, 14 Pet. 56; Rector *v.* Ashley, 6 Wall. 142; Gordon *v.* Caldcleugh, 3 Cr. 268; Doe *v.* Eslava, 9 How. 421; Montgomery *v.* Hernandez, 12 Wh. 129.

[3] Scott *v.* Jones, 5 How. 343; Coons *v.* Gallagher, 15 Pet. 18; Williams *v.* Norris, 12 Wh. 117; Owings *v.* Speed, 5 Id. 420; McKinney *v.* Carroll, 12 Pet. 70; Crowell *v.* Gallagher, 10 Id. 368.

[4] Trebilcock *v.* Wilson, 12 Wall. 687. See also Dooley *v.* Smith, 13 Id. 604; Legal Tender Cases, 12 Id. 457; University *v.* People, 99 U. S. 309.

[5] Aldrich *v.* Ætna Co., 8 Wall. 491. See also White's Bank *v.* Smith, 7 Id. 640.

treaty of the United States, the decision must be against the title, right or privilege specially set up or claimed by the party seeking a review of the judgment of the state court.

Thus, where a defendant in a suit in ejectment claimed the land in controversy under a title which sprung from a reservation in a treaty between the United States and an Indian tribe, and the state court decided against the validity of the title thus set up, it was held by the Supreme Court that the title thus asserted grew out of a treaty, and that the case presented a proper federal question which gave the court jurisdiction.[1] So where the claim of title to land rested upon an act of Congress, it was held that it must appear that the decision was against the claim thus asserted, to give the Supreme Court jurisdiction on a writ of error.[2] And where the question presented to the state court was as to the validity of a patent of lands granted by the United States, and the decision of the state court was against its validity, this was held to be reviewable on a writ of error.[3]

§ 338. **Review on error in criminal cases.**—The statute covers decisions in criminal cases as well as in civil suits, and there is no distinction between them in respect to the right of re-examination in this court.[4]

The statute gives precedence in such cases on the docket of the Supreme Court. It provides as follows: "Cases on writs of error to revise the judgment of a state court in any criminal case shall have precedence on the docket of the Supreme Court of all cases to which the government of the United States is not a party, excepting only such cases as the court in its discretion may decide to be of public importance."[5]

For forms on writs of error and on appeals, see *post*, No. 236, *et seq.* For forms of various writs, see *post*, No. 254, *et seq.*

§ 339. **Transcripts and other papers on appeal.**—In case of appeal of any cause in equity or of admiralty and maritime jurisdiction,

[1] Henderson *v.* Tennessee, 10 How. 311; Owings *v.* Norwood, 5 Cr. 344; Udell *v.* Davidson, 7 How. 769; Fulton *v.* McAffee, 16 Pet. 149; Montgomery *v.* Hernandez, 12 Wh. 129.

[2] Rector *v.* Ashley, 6 Wall. 142; Bagnel *v.* Brodrick, 13 Pet. 436; Lessieur *v.* Price, 12 How. 60.

[3] Reichart *v.* Felps, 6 Wall. 160. See also Taylor *v.* Maguire, 17 Wall. 253; Neilson *v.* Lagow, 12 How. 110; Carpenter *v.* Williams, 9 Wall. 786.

[4] Prigg *v.* Commonwealth, 16 Pet. 539; Worcester *v.* Georgia, 6 Pet. 515; Cohens *v.* Virginia, 6 Wh. 264; Twitchell *v.* Commonwealth, 7 Wall. 32.

[5] Rev. Stat. § 710.

or of prize or no prize, a transcript of the record and copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal, must be transmitted to the Supreme Court. And either the court below or the Supreme Court may order any original document or other evidence to be sent up in addition to the copy of the record or in lieu of a part of it. On such appeals no new evidence can be received in the Supreme Court except in admiralty and prize cases.[1] The transcript is required to be under the hand of the clerk with the seal of the court; but it is sufficiently authenticated if it be signed by a deputy clerk in the name of and for his principal, and sealed with the seal of the court.[2]

[1] Rev. Stat. § 698; Id. § 750.

[2] Garneau *v.* Dozier, 100 U. S. 7.

CHAPTER XIV.

PRACTICE AND PROCEDURE ON WRITS OF ERROR AND APPEAL.

§ 340. **The writ and record.**—Having considered the jurisdiction of the Supreme Court on writs of error and appeal, we now proceed to point out more particularly the practice and procedure in such cases.

When a writ of error is allowed it will be issued by the clerk of the court, as we shall hereafter more particularly notice, signed by him and under the seal of the court, and bear teste of the Chief Justice, and be directed to the clerk of the court the judgment of which it is sought to review.[1] It is the duty of the clerk to which it is directed to make return thereto, and to annex to and return with the writ, "at the day and place mentioned, an authenticated transcript of the record, and assignment of errors, and a prayer for reversal, with a citation to the adverse party;"[2] and in all cases brought to the Supreme Court by writ of error or appeal, the clerk of the court by which the judgment or decree was rendered is also required to annex to and remit with the record a copy of the opinion or opinions filed in the case; and no cause will "be heard until a complete record, containing in itself, without references *aliunde*, all the papers, exhibits, depositions and other proceedings which are necessary to the hearing in this court, shall be filed."[3]

If there is a failure in these respects, the circuit court may either dismiss the writ or appeal or may dispose of the case so far as it can consistently be done on the record returned.[4] But it is the duty of the plaintiff in error to see that a proper transcript is prepared, and if it does not contain all that it should contain, he may, on a proper showing, procure a *certiorari* for diminution of record, and thereby secure a full and proper return. But the citation is not considered as a part of the record, as it is not a part of the proceedings of the court, and hence a cause will not be dismissed

[1] Gen. Rule 8.
[2] Rev. Stat. § 997.
[3] Gen. Rule 8, par. 2 and 3.
[4] It was so held also where there was a failure to file a brief, in the form required by Gen. Rule. 21: Portland Co. *v.* United States, 15 Wall. 1; Deitsch *v.* Wiggins, 15 Wall. 539.

on this account, but proof thereof may be shown *aliunde*.[1] For forms in case of writ of error or appeal, see *post*, No. 236, *et seq.*

§ 341. **Rules relating to the transcript and papers.**—Rule 8 provides that whenever it shall be necessary or proper, in the opinion of the presiding judge of the circuit court or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in the Supreme Court upon appeal or writ of error, he may make such rule or order for the safe keeping, transportation and return of such papers as to him may seem proper, and the Supreme Court will receive and consider such papers in connection with the transcript of the proceedings. And Rule 11 provides that whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony or other proceeding in a foreign language, and the record does not contain a translation of such document, paper, testimony or other proceeding, made under the authority of the inferior court or admitted to be correct, the record shall not be printed, but the case shall be reported to the court by the clerk, and the court will thereupon remand it to the inferior court in order that a translation may be there supplied and inserted in the record. For form of writ of error to state court, see *post*, No. 239. For form of writ of error to federal court, see *post*, No. 240.

§ 342. **Writs of error; when returnable.**—In reference to the time of the return of a writ of error and citation, it is provided by rule that "in cases where final judgment is rendered more than thirty days before the first day of the next term of this court, the writ of error and citation, if taken before, must be returnable on the first day of said term, and be served before that day; but in cases where the judgment is rendered less than thirty days before the first day, the writ of error and citation may be made returnable on the third Monday of the said term, and be served before that day."[2] It is further required by statute that the adverse party shall have at least thirty days notice on a citation to the Supreme Court.[3] For form of citation, see *post*, No. 341.

§ 343. **Bond for costs.**—It is the duty of the clerk of the Supreme Court to take a bond of the plaintiff in error or appellant, with competent surety to secure his fees in the penalty of two hun-

[1] Innerarity *v.* Byrne, 5 How. 295.
[2] Gen. Rule 8, par. 5.
[3] Rev. Stat. § 999. See also Gen. Rule 9.

dred dollars; or to require of the said party a deposit of that amount to be placed in bank subject to his draft, or otherwise satisfy him in that behalf.[1] Each party is, however, primarily liable to the clerk for such fees, for services he performs for such party, without regard to the party who recovers costs; and these costs may be enforced by process of attachment.[2]

Rule 10 on this subject provides: "Upon the clerk of this court producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due them respectively in this court, on such parties or their sureties, an attachment shall issue against such parties or their sureties respectively, to compel payment of the said fees."[3]

§ 344. **Appearance of counsel; and the parties.**—Upon the filing of the transcript of the record, brought up either by writ of error or appeal, the appearance of the counsel for the plaintiff in error or appellant shall be entered.[4] If there should be no appearance entered for the plaintiff or appellant when the case is called for trial, the defendant or appellee may have the case called and dismiss the writ of error, or may open the record and ask for an affirmance of the judgment below.[5] If the defendant fails to appear when the cause is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.[6] If neither party appears when the case is reached on a regular call of the docket, and no appearance is entered for either party, the case must be dismissed at the cost of the plaintiff;[7] and if at the second term neither party is prepared to argue the cause, it will be dismissed at the cost of the plaintiff, unless sufficient excuse is shown for a postponement.[8]

§ 345. **Docketing cases; filing transcript.**—If a writ of error or an appeal is brought to this court from any judgment or decree rendered thirty days before the commencement of the term, it is the duty of the plaintiff in error or the appellant, as the case may be, to docket the cause and file the record thereof with the clerk of the Supreme Court, within the first six days of the term; and if the writ of error or appeal is brought from a judgment or decree ren-

[1] Gen. Rule 10, as amended May 8, 1876.
[2] Caldwell *v.* Jackson, 7 Cr. 277.
[3] For form of bond, see *post*, No. 242.
[4] Gen. Rule 9, par. 3.
[5] Gen. Rule 16.
[6] Gen. Rule 17.
[7] Gen. Rule 18.
[8] Gen. Rule 19.

dered less than thirty days before the commencement of the term, it is the duty of the plaintiff in error or appellant to docket the cause and file the record thereof with the clerk of the court within the first thirty days of the term. If he fails so to do, the defendant in error or appellee, as the case may be, may have the case docketed and dismissed by producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause and certifying that the writ of error or appeal has been duly sued out and allowed; and in no case will the plaintiff in error or appellant be allowed to docket the cause and file the record after the same shall have been docketed and dismissed as aforesaid, unless by the order of the court.[1] But in cases of writs of error or appeals from California, Oregon, Washington, New Mexico, Utah, Nevada, Arizona, Montana and Idaho, the time mentioned above is extended to sixty days.[2]

Under the provisions of this rule the appellee cannot use the copy of the record, brought up by the appellant and lodged with the clerk of this court, to have the case docketed and dismissed, on the ground that the appellant has failed to comply with the rule which requires a bond to be given for the clerk's fees.[3] To sustain such a motion it would be necessary to procure and produce a certificate of the clerk of the court below, stating the cause and showing that the appeal had been duly allowed.[4]

And it has been held that the certificate of the clerk of the court below, that he cannot consistently with his other duties certify the record in time to comply with the rule, is not a sufficient reason for extending the time prescribed by the rule.[5] But in a more recent case the court was disposed not to enforce it, where the delay in procuring the transcript arose from no fault of the appellant, but resulted from the fraud of the other party, or the ill-founded order of the court, or the contumacy of the clerk below.[6] In the absence of any showing of excuse for the delay, the transcript must be filed and the case docketed in the Supreme Court at the term next following the date of the appeal, or the court will not have jurisdic-

[1] Gen. Rule 9.
[2] Id.
[3] Gen. Rule 10.
[4] West *v.* Brashear, 12 Pet. 101.
[5] Sturgess *v.* Harrold, 18 How. 40. See also Edmondson *v.* Bloomshire, 7 Wall. 306.
[6] United States *v.* Gomez, 3 Wall. 752. See also United States *v.* Hodge, 3 How. 534; Villabolos *v.* United States, 6 How. 81.

tion and the cause will be dismissed; but this would not prevent another appeal at any time within two years, and this court would take cognizance of the case on such subsequent appeal, if the transcript was properly filed and the case docketed at the term and within the time prescribed after the date of the last appeal.[1]

§ 346. **Duty of the clerk; records to be printed.**—It is the duty of the clerk of this court to have fifteen copies of the record, in all cases, printed for the use of the court, to be charged to the government with the expenses of the court; and it is his duty to furnish manuscript copies to the printer for this purpose, and to supervise the printing, and to take care of and distribute the printed copies to the judges, the reporter and the parties, from time to time, as required. He is required to deliver to each party a copy of the printed record, and in case of dismissal, reversal, or affirmance with costs, the fees for the said manuscript copy of the record shall be taxed to the party against whom the costs are given; which includes the charge for the copy furnished him. But in case of dismissal for want of jurisdiction, the fees for the copy must be taxed against the party who brought the cause into court, unless the court shall otherwise direct.[2]

§ 347. **Motion day.**—By a rule of this court Monday of each week is motion day, on which all motions ready for argument will be heard. All motions not required by the rules of the court to be put on the docket are entitled to a preference, and will be heard immediately after the rendering of opinions, if such motions shall be made before the court shall have entered upon the hearing of a cause upon the docket.[3]

For forms of motion in different cases, see *post*, Nos. 220, 228.

§ 348. **Motions to dismiss and affirm.**—All motions must be in writing, and contain a brief statement of the facts on which they are based and the objects of the motion; and no motion to dismiss can be heard unless previous notice thereof is given to the adverse party or the attorney or counsel of such party, unless the court shall make a special assignment to docket and dismiss appeals and writs of error. And all such motions, except those to docket and

[1] Steamer Virginia *v.* West, 19 How. 182; United States *v.* Carey, 6 How. 106; Mesa *v.* United States, 2 Black 721.

[2] Gen. Rule 10.

[3] Gen. Rule 6, as amended December 14, 1874.

dismiss, as provided for by the ninth rule, must be submitted in the first instance on printed briefs or arguments; and if the court desires further argument on the subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss is required to serve notice of the motion, with a copy of his brief or argument, on the counsel for the plaintiff in error or the appellant of record in this court, at least three weeks before the time fixed for submitting the motion, except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice must be served at least thirty days before the time fixed for the hearing of the same.[1]

With a motion to dismiss a writ of error to a state court there may also be united a motion to affirm on the ground that, although the record may show that the court has jurisdiction, it is manifest that the writ was sued out for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.[2] But in such a case, if there is no color of right to dismiss and the case is clearly within the jurisdiction of the court, the motion to affirm merely will be denied.[3] If the appeal is dismissed for failure of the appellant to file a transcript in due time, the clerk cannot properly give a certificate thereof or issue a mandate thereon during the term, as the appellant may thereafter move the court for leave to file a transcript during the term, and to have the cause redocketed.[4]

If the court below, having no jurisdiction, gives a judgment in a cause for either party, or improperly decrees affirmative relief to a claimant, this court will reverse it, and not merely dismiss the suit. But it is not important on error or appeal when or how the court below obtained jurisdiction. It is sufficient that it had jurisdiction at the time the judgment or decree was rendered, even though rendered by consent, and no errors of law will be considered which were waived by such consent.[5]

§ 349. **Mode of service of notice and proof.**—Service of the notice of a motion to dismiss may be made on counsel by mail; and an affidavit of the deposit in the mail of the notice and brief

[1] Gen. Rule 6.

[2] Gen. Rule 6, as amended May 8, 1876, November 4, 1878.

[3] Whitney *v.* Cook, 99 U. S. 607.

[4] The Bank of U. S. *v.* Swan, 3 Pet. 68.

[5] Pacific Railroad *v.* Ketchum, 101 U. S. 289; Removal Cases, 100 U. S. 457.

or argument to the address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail three weeks or thirty days, as the case may require, before the time fixed by the notice for a hearing, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia; and on proof of such service the motion will be considered, unless for satisfactory reasons further time be given by the court to either party.[1]

§ 350. **Procedure in case of diminution of record.**—We have referred to certiorari as the proper remedy in case of diminution of the record sent up to this court in case of a writ of error or appeal.[2] But this will not be awarded unless a motion therefor is made in writing, and the facts on which it is based shall be verified by affidavit or admitted by the opposite party. It is further required that all motions for a certiorari shall be made at the first term of the entry of the cause; otherwise it cannot be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.[3] A return to a certiorari is sufficient if made by the clerk, without being signed by the judge.[4] If there appears to be an omission of an important paper from the record sent up, which may be necessary for a correct decision of the case, the court may, on its own motion, order the case continued and a certiorari to be issued to bring it up.[5]

The writ of certiorari is properly used in such cases only to bring up to the court of error documents, writings and other portions of the record which have not been sent up, and it cannot be used to compel the Court of Claims to supply certain supposed defects in its conclusions deducible from the evidence before it.[6]

For form of writ of certiorari, see *post*, No. 260.

§ 351. **Where either party dockets the case; rights of appellee.**—Either party may docket a cause; and if docketed and a copy of the record is filed with the clerk, either by the plaintiff in error or

[1] Gen. Rule 6, par. 5.

[2] *Ante*, § 374.

[3] Gen. Rule 14.

[4] Stewart *v.* Ingle, 9 Wh. 526; Worcester *v.* Georgia, 6 Pet. 515.

[5] Morgan *v.* Curtenius, 19 How. 8. See also *Ex parte* Dugan, 2 Wall. 134; Clark *v.* Hackett, 1 Black 77; Stearns *v.* United States, 4 Wall. 1.

[6] United States *v.* Adams, 9 Wall. 661. The circuit court had no power to issue a writ of certiorari to a commissioner appointed by the court under the act of September 18, 1850, he being in no legal sense a magistrate inferior to the circuit court: *Ex parte* Van Orden, 3 Blatch. 166.

appellant, within the time prescribed by Rule 9, or by the defendant in error or appellee at any time thereafter during the term, the case stands for argument during the term.[1]

§ 352. **When the state is a party.**—In certain cases a state is entitled to priority on the docket, where it is a party to a suit. Section 949 of the Revised Statutes provides: "When a state is a party, or the execution of the revenue laws of a state is enjoined or stayed in any suit in a court of the United States, such state, or the party claiming under the revenue laws of a state the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient reason, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties."

Under the provisions of this section, if the state is plaintiff merely *ex relatione*, the cause will not be advanced even on the consent of both parties, as where the suit is in the name of a state and in the nature of a quo warranto to try the title to an office.[2] Nor are the ordinances of a municipal corporation levying taxes, revenue laws of a state within the meaning of the statute, and a case arising under them is not entitled to priority on the docket.[3]

Nor will preference be given to cases in which the execution of the revenue laws of a state is enjoined, unless it satisfactorily appears that the operations of the government of the state will be embarrassed by the delay. The court may determine, under all the circumstances of the case, what is a "sufficient reason" for the preference given by the statute.[4] The motion for the advancement of a cause under the statute must be made by a state or by a party claiming under the laws of a state.[5]

Where a person was indicted and convicted in one of the inferior courts of the state of Maryland for trading without having a license as required by the laws of that state, and the judgment was affirmed in the court of appeals of that state, and brought to this court on a writ of error, where a motion was made by the plaintiff in error to advance the cause, it was held that the motion was not within the foregoing statute, as the motion was not filed by the state nor by a party claiming under the laws of the state; that under the 26th

[1] Gen. Rule 9, par. 2.
[2] Miller *v.* State, 12 Wall. 159.
[3] Davenport City *v.* Dows, 15 Wall. 390.
[4] Hoge *v.* Railway Co., 93 U. S. 1.
[5] Ward *v.* State, 12 Wall. 163.

rule of the court it was a motion addressed to its discretion, and that inasmuch as it appeared that the plaintiff in error was not in jail, the court refused to grant the motion.[1]

And, as we have observed, the statute does not apply to the ordinances of a municipal corporation, as they cannot be classed as revenue laws of a state; and the preference given to the state when it is a party, or when its revenues are enjoined, to any party claiming under such laws, is from the presumed importance of such cases to the internal welfare of such state and because of its dignity as a member of the Union, and these reasons for the preference do not apply to municipal more than to private corporations.[2]

§ 353. **Submission of causes on printed arguments.**—Causes may be submitted to the court on printed arguments, where counsel on both sides choose to do so, within the first ninety days of the term; but in such cases twenty copies of the arguments, signed by attorneys and counsellors of this court, must be first filed,—ten copies for the court, two for the reporter, three to be retained by the clerk, and the residue for counsel. And if a case is reached on a regular call of the docket, and a printed argument shall be filed for one or both parties, the case stands on the same footing as if there were an appearance by counsel. But if a case, under such circumstances, is argued orally on behalf of one party only, a printed argument on behalf of the other party will not be received unless it is filed before the argument begins, and if none is filed, the court will consider and decide the case upon the *ex parte* argument; and no brief or argument will be received, through the clerk or otherwise, after the case has been argued and submitted, except after notice to the opposite party, and upon leave granted in open court.[3]

§ 354. **Call of the docket.**—The mode of procedure on a call of the docket is pointed out by the rules of the court. The call commences on the second day of the term, and cases will be taken up for argument in the order they stand on the docket, if the parties or either of them are ready when the cases are called. If neither party is ready, the case will go down to the foot of the docket; but only ten causes will be considered as liable to be called each day, including the one under argument.[4]

[1] Ward *v.* Maryland, 12 Wall. 163.
[2] Davenport City *v.* Dows, 15 Wall. 390.
[3] Gen. Rule 20.
[4] Gen. Rule 26.

Criminal cases, however, may be advanced, on motion of either party, by leave of court; and revenue cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also, by leave of court, be advanced on motion of the Attorney-General; but all motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.[1] No other cause will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court; and every cause which shall have been called in its order and passed, and placed at the foot of the docket, will, if not reached again during the term, be continued to the next term. But after a cause has been passed, under circumstances which do not require it to be placed at the foot of the docket, the parties may have it heard by filing with the clerk a joint request to that effect. The clerk must then reinstate the case for call ten cases after the case under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, then either party may move to take up the cause, and it will then be assigned to such a place on the docket as the court may direct. But no stipulation to pass a cause without placing it at the foot of the docket will be recognized as binding upon the court, and a cause can otherwise be passed only upon an application made for that purpose, and by leave granted in open court.[2] Two or more cases involving the same question may, however, by leave of court, be heard together, but they must be argued as one case.[3]

§ 355. **The argument; preparation for the same; procedure on.**— Only two counsel will be heard for each party on the argument of a cause, and only two hours on each side will be allowed for argument, unless by special leave of the court, granted before the argument begins. This time may be apportioned between the counsel in their discretion; but there must be a fair opening of the case by the party having the opening and closing arguments.

At least six days before the argument, the counsel for the plaintiff in error or appellant is required to file with the clerk of the

[1] Gen. Rule 26. If a cause has been placed at the foot of the docket, the court will not take it up on motion and assign a day for its argument, when other cases of great public importance have been assigned for what may be the remainder of the term: Berry *v.* Mercein, 4 How. 574.

[2] Gen. Rule 26, par. 7.

[3] Id., par. 6.

court twenty copies of a printed brief, one of which on application he is required to furnish to each of the counsel engaged upon the other side. This brief is required to contain, and in the order hereinafter stated—

1. A concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

2. An assignment of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and specifically each error asserted and intended to be urged, and in cases brought up by appeal the assignment shall state, as specifically as may be, in what the decree is alleged to be erroneous. If error is assigned to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

3. A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record, and the authorities relied upon in support of each point. When the statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

4. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether in the instructions given or instructions refused.

5. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected.

6. Counsel for a defendant in error, or appellee, shall file with the clerk twenty printed copies of his argument, at least three days before the case is called for a hearing. His brief shall be of a like character with that required of the plaintiff or appellant, except.no assignment of error is required, and no statement of the case unless that presented by the plaintiff or appellant is controverted.

7. Without such an assignment of errors, counsel will not be heard except at the request of the court, and errors not assigned according to this rule will be disregarded, though the court, at its option, may notice a plain error not assigned.

8. When, according to this rule, the plaintiff in error or appellant is in default, the case may be dismissed on motion, and when a defendant in error or an appellee is in default, he will not be

heard except on consent of his adversary and with request of the court.

9. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.[1]

The plaintiff or appellant is entitled to the opening and closing argument, except when there are cross appeals, when they are required to be argued together, and the plaintiff in the court below is entitled to open and conclude the argument.[2]

§ 356. **Judgment on review.**—This court may, on review of any judgment, decree or order of the circuit court or the district court acting as a circuit court, or in prize cases, affirm, modify or reverse it, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require. But the court is prohibited from issuing executions in such cases, and is required to send a mandate to the court below to award execution on the judgment.[3] There is, however, a discretion in the court in respect to giving a judgment and awarding execution in case of a writ of error to a state court. In such a case it may proceed to a final decision and award the execution or remand the same to the court from which the case was removed.[4]

The practice and power of this court in such cases may be illustrated by its procedure in a recent case. In Insurance Companies *v.* Boykin,[5] the defendant in error brought a suit on a policy of insurance for a loss sustained. The policy was signed by four companies who were made defendants, each of whom had agreed to become liable for one-fourth of any loss to the extent in all of ten thousand dollars, and the plaintiffs in error had consented that the action might be brought against all of them jointly instead of severally. The verdict of the jury was "that said defendants did promise and assume as said plaintiff hath alleged, and they assess the damages of the said plaintiff at ten thousand dollars, with interest from the 20th of March, 1867," and the court rendered a joint judgment accordingly. This was one of the errors assigned in this court.

[1] Gen. Rule 21.
[2] Gen. Rule 22.
[3] Rev. Stat. § 701.
[4] Rev. Stat. 709, amended February 18, 1875.
[5] 12 Wall. 433.

It was here held that the verdict was a good one, but that the court ought to have rendered a judgment that the plaintiff recover of each of the defendants severally for the one-fourth part of the ten thousand dollars, and interest from the time mentioned in the verdict, and joint judgment against all of the defendants for costs. And this court entered the judgment which the circuit court should have done.

It is the usual practice of this court to dismiss a cause where the court below had no jurisdiction of it. But this in some cases would work injustice, as, for instance, where the inferior court has given a judgment or decree for plaintiff, or improperly decreed affirmative relief to a claimant in a case where it had no jurisdiction. "In such a case the judgment or decree of the court below must be reversed, else the party which prevailed there would have the benefit of such judgment or decree, though rendered by a court which had no authority to hear and determine the matter."[1] In such a case the judgment or decree should be reversed for want of jurisdiction, and the cause remanded with directions to dismiss the case.[2]

§ 357. **Judgment where there are errors apparent in the record.**— Where there is manifest error apparent on the face of the record a re-examination in this court will be had, whether it appears by a bill of exceptions or otherwise. Whatever the error may be, the facts must appear on the record in order to enable the court to review the case; but neither a bill of exceptions nor a special verdict nor an agreed case is always necessary in order to make the error apparent to a court of review. The error may otherwise appear, and where it is thus manifest, this court will consider and revise the judgment. Thus, where a suit was brought on a policy of insurance on a vessel and cargo for a total loss, and the jury found a verdict for the whole amount insured with interest, and five thousand dollars damages besides for the detention of the money and interest, and judgment was entered therefor, on error, it was held that the plaintiff below could not recover damages beyond the legal interest; that the error did not require a *venire de novo*, as it consisted in giving judgment for the five thousand dollars damages. This court therefore reversed and modified the judgment by disallowing the five thousand dollars, and the cause was remanded with

[1] United States *v.* Huckabeer, 16 Wall. 414.

[2] Cutler *v.* Rae, 7 How. 729.

directions to enter judgment for the residue found by the jury with interest.[1]

§ 358. **Judgment; interest; damages.**—Where the judgment of the inferior court is affirmed on a writ of error, interest on the same at the same rate that similar judgments bear interest in the state where the judgment is rendered is allowed from the date of the judgment below until it is paid.[2] And "in all cases where a writ of error shall delay the proceedings of the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at the rate of ten per cent., in addition to interest, shall be awarded upon the amount of the judgment."[3] And "the same rule is applied to decrees for the payment of money in cases in chancery, unless otherwise ordered by this court."[4] But interest is not generally allowed in admiralty cases.[5]

§ 359. **Where the verdict is clearly right, the court will not reverse for technical inaccuracies in the charge.**—Where there is no evidence to impeach the claim made, and it is established by competent evidence, and there is no set-off, counter-claim, release or payment pleaded or shown, the court may instruct a jury to find for the plaintiff the amount so proven, as such an instruction is in accordance with the legal effect of the evidence, and there would be no disputed facts on which the jury could pass.[6] And if it clearly appears in any case that there are no disputed facts bearing on the real matters in issue, and the verdict is manifestly right, and especially where the record shows that no other result would be obtained by a new trial, this court will not reverse the case, although there may have been some technical inaccuracies in the instructions given to the jury.[7]

§ 360. **When a new trial will be awarded.**—Under the sanction of the Revised Statutes allowing this court, on a review of a judgment or decree of the inferior court, to direct "such further proceedings to be had by the inferior court as the justice of the case may require," this court may, unquestionably, direct a trial to be

[1] Insurance Co. *v.* Piaggio, 16 Wall. 378; Suydam *v.* Williamson, 20 How. 427; Burnett *v.* Butterworth, 11 How. 669; Slocum *v.* Pomeroy, 6 Cr. 221; Garland *v.* Davis, 4 How. 131; Cohens *v.* Virginia, 6 Wh. 410.

[2] Gen. Rule 23, par. 1.

[3] Id., par. 2.

[4] Id., par. 3.

[5] Hemmenway *v.* Fisher, 20 How. 255.

[6] Bevans *v.* United States, 13 Wall. 56.

[7] Walburn *v.* Babbitt, 16 Wall. 577.

had *de novo*, where in its opinion justice requires it. This was the practice under the Judiciary Act, and is in accordance with the practice at common law where the record did not furnish facts upon which to base a judgment. In such a case the statutes would require this court, in the exercise of its proper functions as an appellate court, and in furtherance of justice, to remand the cause for a new trial. If there is a demurrer to evidence, there should be a joinder in demurrer, and this supposes that the facts are admitted; the proper function of such a demurrer being to submit to the court the law arising from the facts. The party demurring to the evidence cannot insist upon a joinder in demurrer, under the common law practice, without distinctly admitting upon the record every fact and every conclusion which the evidence given for the adverse party conduces to prove; and if there should be a joinder in the demurrer, without such admission and a judgment thereon, the judgment would be reversed for this cause, and in such a case this court would necessarily have to remand the cause for a new trial.[1] So, where the special verdict of a jury is too imperfect to enable the court to render a judgment upon it, although it may reverse the judgment of the court below, it will remand the cause, with directions to set aside the verdict and award a *venire facias de novo*.[2]

§ 361. **When a cause will be remanded for amendments.**—In an action on the case, there was a plea of "non assumpsit," and the issue and verdict followed the plea. On error, it was held by this court that this defect was a material one and not cured by the verdict; that it did not contain enough of substance to put in issue the material parts of the declaration; that the judgment on the verdict was not properly rendered; and although this court would not direct amendments or a repleader, it reversed the judgment and remanded the case for further proceedings.[3] A new trial has sometimes been awarded in courts of error to enable parties to amend,[4] and in one case this court not only reversed a judgment and awarded a *venire de novo*, but gave "directions also to allow the parties liberty

[1] Gibson *v.* Hunter, 2 H. Bl. 187; Fowle *v.* Alexandria, 11 Wh. 320; Bank of U. S. *v.* Smith, 11 Wh. 171.

[2] McArthur *v.* Porter, 1 Pet. 626. See also Farr *v.* United States, 5 Pet. 373; Graham *v.* Bayne, 18 How. 60.

[3] Garland *v.* Davis, 4 How. 131; Day *v.* Chism, 10 Wh. 404.

[4] United States *v.* Hawkins, 10 Pet. 125; Barnes *v.* Williams, 11 Wh. 416; Bellows *v.* Bank, 2 Mason 31; Peterson *v.* United States, 2 Wash. (C. C.) 36.

to amend their pleadings."[1] For forms of judgments and decrees, see *post*, Nos. 245, 246, 248, *et seq.* See also Nos. 252, 253.

§ 362. **The mandate.**—It will be noticed that the Supreme Court, in the exercise of its jurisdiction on appeals from the inferior federal courts, does not possess the power to execute its judgments except in certain cases. It can only send a special mandate to the inferior federal court to award execution.

But on a writ of error to a state court, as we have noticed,[2] this court "may reverse, modify or affirm the judgment or decree of such state court, and may at their discretion award execution." For form of mandate, see *post*, Nos. 247, 251.

§ 363. **Mandate conclusive upon the court below.**—The court to which the mandate is directed must execute it according to its directions and the intentions of this court. Where the mandate is uncertain and ambiguous in its terms, the court to which it is directed must exercise its judgment in the matter in the light of the opinion and decision of this court and the reason and justice of the case. The authority of this court or the jurisdiction of the inferior court to try the cause cannot be inquired into. Where the merits of the controversy are decided, and the mandate requires the execution of the decision, it is final.[3] Nor will a mandamus in the nature of a *procedendo* be granted thereafter by the Supreme Court, to the judge of the court below, to compel him to sign a bill of exceptions in the case,[4] nor can such court entertain a petition for a rehearing of the case after a decision of the Supreme Court and the issue of a special mandate for its execution, as the court has no authority to disturb the final judgment or decree of the Supreme Court, and can only settle what remains to be done, by the execution of the mandate.[5]

§ 364. **The mandate may be revoked.**—Notwithstanding the court below cannot question the authority of the Supreme Court in issuing the mandate, or disobey its requirements, the Supreme Court may, in a proper case, declare the judgment rendered by it null and void, and revoke the mandate. Thus, where an appeal from a circuit court was prosecuted, and a decree was rendered

[1] United States *v.* Kilpatrick, 9 Wh. 730; Mollan *v.* Torrance, 9 Wh. 537.

[2] See *ante*, § 356; Rev. Stat. § 709.

[3] Skillern *v.* May, 6 Cr. 267; *Ex parte* Story, 12 Pet. 339; *Ex parte* Dubuque, etc., R. Co., 1 Wall. 69.

[4] *Ex parte* Story, *supra.*

[5] Chaires *v.* United States, 3 How. 611.

against the appellee without an appearance on his part, and a mandate was issued to the circuit court, and at a subsequent term it was made to appear that there had been no citation served upon the appellee, the court declared the former judgment null and void, and the mandate was revoked.[1]

This practice was followed in the subsequent case of United States *v.* Gomez.[2] The cause was docketed and dismissed on motion of the appellee and remanded, and a mandate sent down to the court below. A motion was afterwards made in the Supreme Court for the rescision of the order of dismission and for a recall of the mandate; and the court being satisfied from the evidence before it that no appeal in the case had been granted by the court below, and that the cause was not properly before it when it was remanded at the instance of the appellee, it rescinded and annulled the decree of dismissal and revoked and cancelled the mandate. For form of decree in such a case, see *post*, No. 252.

§ 365. **Costs on affirmance, reversal, dismissal.**—By the 24th rule, costs are allowed to the defendant in error or appellee, as the case may be, in all cases of dismissal, except where the dismissal is for the want of jurisdiction, unless otherwise agreed by the parties; and in all cases of the affirmance of the judgment or decree of the inferior courts, costs shall be allowed to the defendant in error or appellee, as the case may be, unless otherwise ordered by the court. But in case of a reversal of any such judgment or decree, costs are allowed to the plaintiff in error or appellant, as the case may be, unless otherwise ordered by the court; and the costs of the transcript of the record are a part of such costs. These provisions, however, do not apply to cases where the United States are a party. In such cases no costs will be allowed in this court for or against the United States.[3]

In case any suit is dismissed in this court, it is the duty of the clerk to issue a mandate or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings of this court, so that such further proceeding may be had therein as law and justice may require; and it is his duty also to insert in such mandate or other proper process any costs that may be allowed in this court, and annex to it a bill of items of such costs taxed in detail.[4]

[1] *Ex parte* Crenshaw, 15 Pet. 119.
[2] 23 How. 326 (1859).
[3] Gen. Rule 24, paragraphs 1, 2, 3, 4.
[4] Gen. Rule 24, paragraphs 5, 6.

§ 366. **Recording the opinions.**—The opinion of the court, upon the delivery thereof, must be recorded by the clerk immediately; and it is his duty to furnish the reporter with a copy of the same as soon as it shall be recorded. This is required to be done during the term, in order to avoid delay in the publication of the reports. The original opinions must be filed with the clerk for preservation.

The statute further expressly provides that "where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court, the court shall adjudge to the respondent in error just damages for his delay, and single or double costs at its discretion;"[1] and that "there shall be no reversal in the Supreme Court or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."[2]

If the writ is sued out merely for delay, damages will be allowed at the rate of not exceeding ten per cent. from the date of the judgment in the circuit court;[3] but damages for more than that sum cannot be given.[4] If every question involved in the case has been settled by former adjudications, this is satisfactory evidence that the writ has been sued out for delay, and damages will be allowed therefor.[5] But damages for a delay cannot be allowed on the affirmance of a decree in admiralty.[6]

§ 367. **Rehearing.**—There is no statute or rule of court providing for a rehearing of a cause in the Supreme Court, and it has been held that the court has no authority to reverse its own decisions;[7] yet, as we have seen, it has frequently exercised a revisory power over them, where it had no jurisdiction in fact, but had been induced to assume jurisdiction by fraud or mistake.[8]

It has been further held that the practice in the English chancery

[1] Rev. Stat. § 1010; Winchester *v.* Jackson, 3 Cr. 514; Himely *v.* Rose, 5 Id. 313; McIver *v.* Wattles, 9 Wh. 650; Kilburn *v.* State Savings Inst., 22 How. 503; Hennessy *v.* Sheldon, 12 Wall. 440.

[2] Rev. Stat. § 1011. See Stafford *v.* Union Bank, 16 How. 135.

[3] Gen. Rule 23, par. 2; Kilbourne *v.* State Savings Inst., 22 How. 503; Sutton *v.* Bancroft, 23 Id. 320; Jenkins *v.* Banning, Id. 455; Prentice *v.* Pickersgill, 6 Wall. 511; Hall *v.* Jordan, 19 Id. 271; Hennessy *v.* Sheldon, 12 Id. 440.

[4] West Wisconsin R. Co. *v.* Foley, 94 U. S. 100.

[5] Penywit *v.* Eaton, 15 Wall. 380, 382.

[6] The Douro, 3 Wall. 564.

[7] Jackson *v.* Ashton, 10 Pet. 480.

[8] *Ex parte* Crenshaw, 15 Pet. 119; United States *v.* Gomez, 23 How. 326.

courts relating to a rehearing has no application to this court sitting as an appellate tribunal, as the nature and office of the two tribunals are different, and the same rules of practice for a rehearing would not be applicable to both.[1]

The Supreme Court has, however, in several cases allowed a rehearing, and in 1852, in the case last cited, the court ruled: "That no reargument will be heard in any case after judgment is entered, unless some member of the court who concurred in the judgment afterwards doubts the correctness of his opinion and desires a further argument on the subject. And when that happens, the court will of its own accord apprise the counsel of its wishes and designate the points on which it desires to hear them."[2] In 1869 this rule was extended so as to allow counsel to apply for a rehearing, in case the court does not order one. This rule, contained in an opinion of the court by Chief Justice Chase, is as follows: "Where the court does not on its own motion order a rehearing, it will be proper for counsel to submit without argument, as has been done in the present instance, a brief written or printed petition or suggestion of the point or points thought important. If upon such petition or suggestion any judge who concurred in the decision thinks proper to move for a rehearing, the motion will be considered. If not so moved, the rehearing will be denied as of course."[3]

§ 368. **Adjournments.**—Rule 27 provides: "The court will at every session announce on what day it will adjourn at least ten days before the time which shall be fixed upon; and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment."

§ 369. **Dismissal in vacation; duties of clerk.**—Parties to a suit in this court may have it dismissed in vacation. The attorneys of the respective parties who are entered on the record for this purpose may sign an agreement in writing, directing the clerk to dismiss the case, and specifying the terms on which it may be dismissed as to costs. After filing this with the clerk and the payment of the fees which may be due him in the cause, it is his duty to enter the case dismissed, and to give either party requesting it a copy of

[1] Brown *v.* Aspden, 14 How. 25.
[2] Brown *v.* Aspden, *supra;* United States *v.* Knight, 1 Black 489.
[3] Public Schools *v.* Walker, 9 Wall. 603.

the agreement filed with him; but no mandate or other process can issue thereon without an order of the court.[1]

§ 370. **The record on appeal from the Court of Claims.**—On appeal from the Court of Claims, cases are heard upon the record, which must contain—

"1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments and decrees as may be necessary to a proper review of the case.

"2. A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as a part of the record."[2] For forms, see *post*, No. 275.

§ 371. **Rule in reference to the record to be strictly observed.**—The transcript of the record must be prepared strictly in conformity with the rule prepared by the Supreme Court. Only such statement of facts found should be sent up as is necessary to enable the court to determine upon the correctness of the conclusions of law decided by the court below, based upon the facts found.[3] If the statement of facts found is not sufficient, the Supreme Court will not dismiss the case, but remand it to the Court of Claims for a proper finding.[4]

§ 372. **Petition for the allowance of an appeal.**—The second rule in reference to the Court of Claims provided for appeals in cases of judgments or decrees rendered before the adoption of it, to wit: the December Term, 1865, in which cases it was necessary for a party desiring to appeal to make application by petition to the Court of Claims therefor. This rule is now probably obsolete, as there can be no cases to which it would be applicable.[5]

§ 373. **Order of allowance; time limited.**—Appeals from the Court of Claims are not a matter of right, and can only be secured by application for an allowance of the same, to the Court of Claims or the Chief Justice thereof in vacation. This must be made

[1] Gen. Rule 28.
[2] Court of Claims Rule 1.
[3] De Groot *v.* United States, 5 Wall. 419.
[4] United States *v.* Adams, 6 Wall. 101.
[5] See Silverhill *v.* United States, 5 Ct. of Cl. 610.

within ninety days after the judgment is rendered;[1] but the limitation ceases from the time the application is made.[2] If, after an appeal has been allowed, a motion is made for a new trial, this is no ground for a dismissal of the appeal, unless the motion for a new trial prevails, in which case the appeal should be dismissed.[3] And the court may for good cause shown revoke an order allowing an appeal. The allowance in such a case does not absolutely remove the cause from the jurisdiction of the court so long as the record has not in fact been certified up to the appellate court.[4]

The only mode for the review of judgments of the Court of Claims provided by the statutes is on appeal, and the Supreme Court, therefore, has no power to review them on a writ of error.[5] For forms in these cases, see *post*, No. 266, *et seq.*

§ 374. **In case of diminution of record.**—If either party should desire the court below to supply supposed defects in its fact conclusions deducible from the evidence, the proper practice would be to apply by motion for an order on the Court of Claims to make return as to the existence or non-existence of the particular facts set out in the motion; but a writ of certiorari would ordinarily issue on a proper application, alleging a diminution of record or writings.[6]

It is made the duty of the Court of Claims, in all cases where either party is entitled to an appeal, to make and file their findings of fact and their conclusions of law therein in open court, before or at the time they enter their judgment in the case; and in all such cases each party at such time, before the trial, as the court shall prescribe, must submit to the court a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of facts.[7]

[1] Rev. Stat. § 708.

[2] Ct. of Cl. Rule 3. See McNutt *v.* United States, 8 Ct. of Cl. 185.

[3] United States *v.* Ayers, 9 Wall. 608; United States *v.* Crussell, 12 Wall. 175; United States *v.* Young, 94 U. S. 258.

[4] *Ex parte* Roberts, 15 Wall. 384. An appeal cannot be taken from a decision granting a new trial: Young *v.* United States, 95 U. S. 641.

[5] Latham's Appeal, 9 Wall. 145; United States *v.* Young, 94 U. S. 258.

[6] United States *v.* Adams, 9 Wall. 661.

[7] Ct. of Cl. Rules 4 and 5. A consideration of the jurisdiction, practice and procedure in the Court of Claims will be found in another place in this volume. See *post*, ch. xviii.

CHAPTER XV.

WRITS OF PROHIBITION.

§ 375. **Authority of the court to issue.**—The power of the Supreme Court to issue writs of prohibition and writs of mandamus is expressly conferred by a provision of the Revised Statutes, which is as follows: "The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of the law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a state, or ambassador or other public minister, or consul or vice-consul, is a party."[1] The writ of prohibition is an ancient common law writ, and commands the person or tribunal to whom it is directed not to do some act which the court is advised, at the suggestion of the relator, is about to be done contrary to law.[2] The English practice and precedents are generally followed in this country on applications for this writ. The ground therefor is that the district court, proceeding as a court of admiralty and maritime jurisdiction, has no cognizance of the cause, and that the proper jurisdiction thereof belongs to some other court. The general English practice prescribed by statute provided for an application for the writ by motion supported by affidavits; but if the question was complicated, doubtful and uncertain, the party applying therefor was required to make a declaration in prohibition, and to set forth a concise statement of the proceedings in respect to which he prayed for the writ to issue.[3] The practice in this court is to file a motion supported by a petition duly verified, setting forth facts upon which the petitioner relies for the issuance of the writ.[4] The jurisdiction

[1] Rev. Stat. § 688.

[2] If the act is already done the writ cannot undo it. The only effect of the writ is to suspend and prevent further action: United States *v.* Hoffman, 4 Wall. 158.

[3] 1 Wm. IV., ch. 21; 2 Bl. Com. 113. For general practice in England, see Cases in Prohibition, 14 Petersdorf Ab., word *Prohibition;* Pleadings and Forms, 6 Wentworth's Pl. 242; Crouch *v.* Collins, 1 Saund. 136; 2 Chit. Gen. Pr. 355; 2 Sell's Pr. 425.

[4] *Ex parte* Gordon, 1 Black 503; *Ex parte* Easton, 95 U. S. 68.

of this court in such cases is in effect appellate, as it is required to review the proposed action of the district court and determine whether such action is legal, and if not, to prohibit the same. The statute limits the issuance of the writ "to the district courts when proceeding as courts of admiralty and maritime jurisdiction."[1]

Under this provision, application was made, in 1795, for a writ of prohibition to the "judge of the district court of the United States in and for the district of Pennsylvania, to be directed to prohibit him from holding" further jurisdiction of a case pending before him.

The proceedings in the suit, sought to be prohibited, were by libel and process of arrest against the commander of an armed vessel of the French Republic, for an alleged illegal capture on the high seas of a neutral merchant vessel, the property of a citizen of the state of Pennsylvania, and carried into Port de Paix, within the French Republic, the commander of the armed vessel being then in the port of Philadelphia. The suggestion was filed by the commander, in the Supreme Court, in which it was claimed that by the laws of nations and by treaties subsisting between the United States and the French Republic, trials of captures on the high seas of vessels brought within the dominion and jurisdiction of the Republic, and all questions incidental thereto, belonged exclusively to the judiciary of the Republic, and to no other tribunals; that by the law of nations and the aforesaid treaties, the vessels of war of the Republic and the officers commanding them cannot be sued or arrested in ports of the United States for captures on the high seas, and taken for legal adjudication into the ports of the Republic; and that the district court of the United States ought not to maintain jurisdiction or hold pleas of such captures.

The motion for the prohibition was opposed on the ground that the district court had jurisdiction; that if this point were doubtful the prohibition ought not to issue until after sentence; and that on a plea to jurisdiction the injured party had an adequate remedy by appeal. But the court sustained the motion.[2]

This case settled the construction of the statute as to the functions of the writ, and established substantially the common law practice as to its appropriate use in restraining the illegal cogni-

[1] Sec. 13 of the Judiciary Act of 1789; Rev. Stat. § 688.

[2] United States *v.* Peters, 3 Dall. 121.

zance of proceedings where there is a want of jurisdiction, even when there is another adequate remedy.[1]

§ 376. **The writ will issue only in the cases expressly provided for by statute.**—Under the 14th section of the Judiciary Act (now section 716 of the Revised Statutes), it was provided that the Supreme, circuit and district courts shall "have power to issue writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

In 1845 a motion was made to the Supreme Court for a writ of prohibition, to be issued to the district court of the United States for the district of Louisiana, sitting in bankruptcy. It was claimed in support of the motion that it was a proper case for the issuance of the writ; for although there was no special provision made by statute therefor in cases at law or in equity, it was necessary for the appropriate exercise of the appellate powers of the Supreme Court under the provision last referred to. But Judge Story, in an elaborate opinion, disposed of the case by holding that the district court had jurisdiction, and thereby made it unnecessary to decide the question of the power of this court to issue the writ. On this question he observed: "As the district court has not exceeded its jurisdiction, it is not absolutely necessary to be decided. But it may be proper to say, as the point has been fully argued, that we possess no revising power over the decrees of the district court sitting in bankruptcy; . . . that we know of no case where this court is authorized to issue a writ of prohibition to the district court except in the cases expressly provided for, . . . that is to say, where the district courts are proceeding as courts of admiralty and maritime jurisdiction."[2]

The same doctrine was recognized in a subsequent case where

[1] In the case of The Exchange *v.* McFadden, 7 Cr. 116, it was held that a public vessel of war belonging to a foreign sovereign at peace with the United States, when visiting our ports in a friendly manner, is exempt from the jurisdiction of our courts; that unless there is some prohibition, the ports of a friendly nation are considered as open to the public ships of all nations with whom it is at peace; and that they are entitled to the protection of the country whose ports they thus enter. And in the case of The Alecta, 9 Cr. 264, it was laid down as a general rule as to prize jurisdiction, that the trial of captures made on the high seas, *jure belli*, by a duly commissioned vessel of war, whether from an enemy or a neutral, belongs exclusively to that nation to which the captor belongs.

[2] *In re* Christy, 3 How. 292.

application was made for a writ of prohibition to the judges of the circuit court of the United States for the southern district of New York, and its officers and the marshal, to restrain them from further proceeding in a case where the applicant had been found guilty of piracy and sentenced to death. But the court refused the motion for the writ, holding that it could not issue in cases where there is no appellate power or authority of law so to do; and that it would not lie to a circuit court in a criminal case.[1]

In *Ex parte* Graham[2] the application was for a writ to restrain a district judge from proceeding under the act entitled "An act to suppress insurrection and punish treason and rebellion; to seize and confiscate the property of rebels," etc. The act provided that the proceedings should be *in rem*, "and conform as near as may be to the proceedings in admiralty or revenue cases." But the court held that, as it had power to issue the writ only in cases of admiralty and maritime jurisdiction, and the proceedings sought to be prohibited were not of these cases, it could not issue the writ.[3] It was further suggested by the court that if there should be error in the proceedings of the district court, there would be a remedy for the petitioners by a writ of error from the circuit to the district court, and finally from that court to the Supreme Court.

Power is vested in the Supreme Court to issue writs of prohibition to the district courts only where said courts are assuming to take cognizance of cases of admiralty and maritime jurisdiction when they have no jurisdiction;[4] and they can exercise this power in no other case. If the act is done the writ cannot undo it. The only effect of the writ is to suspend action.[5]

§ 377. **Where it will not issue.**—The writ of prohibition will not issue to stop the action of the district court or revise its decrees in bankruptcy, nor in any case to that court except the one mentioned in section 688 of the Revised Statutes; as the particular provision there made for its issuance to the district court in certain cases excludes all authority to issue it under the general provisions of section 716 of the Revised Statutes.[6] And whether the district

[1] *Ex parte* Gordon, 1 Black 503 (1861). See also *Ex parte* Warmouth, 17 Wall. 64.

[2] 10 Wall. 541.

[3] The Union Insurance Co. *v.* United States, 6 Wall. 759; United States *v.* Armstrong's Foundry, Id. 766; The Sarah, 8 Wheaton 391.

[4] *Ex parte* Easton, 95 U. S. 68; United States *v.* Peters, 3 Dall. 121.

[5] United States *v.* Hoffman, 4 Wall. 158; *In re* Christy, 3 How. 292.

[6] *Ex parte* Gordon, 1 Black 503; *In re* Christy, 3 How. 292; *Ex parte* Warmouth, 17 Wall. 64.

court has transcended its jurisdiction depends upon the facts stated in the record upon which the district court is called upon to act, and upon which only it can act, and this court will not, upon an application for the writ, look into matters *dehors* the record.[1]

§ 378. **Application for the writ.**—We have briefly considered the office and functions of the writ of prohibition. The formal application for the writ is called a suggestion, and it should be entitled in the court from which it proceeds, but not in any case or matter, as there is no cause in court.[2] The suggestion, as we have before observed, may be in the form of a petition or motion, supported by affidavits.

For form in such cases, see *post*, No. 254.

For form of writ, see *post*, No. 255.

[1] *Ex parte* Easton, 95 U. S. 68.

[2] Lloyd on Proh. 56.

CHAPTER XVI.

WRITS OF MANDAMUS.

§ 379. **A common law prerogative writ.**—The writ of mandamus is an ancient common law prerogative writ, which issued from the Court of King's Bench and was directed to some person, corporation or inferior court, commanding some particular act or acts to be done which it was their clear duty to do or which had been adjudged should be done or performed by them. It was instituted to prevent a failure of justice, as where the law enjoined a duty upon a judge or court or corporation which they refused to perform, and in the performance of which the party claiming the writ was interested, and by the non-performance of which he would be injured, and the law afforded no other specific or adequate remedy. These general doctrines and principles are applicable to the practice in the federal courts. If the act required is impossible of performance or the right to insist upon its performance is doubtful, or if there is a speedy, adequate and complete remedy by other proceedings at law, the writ will be refused.[1]

§ 380. **Provisions of the Revised Statutes relating to writs of mandamus.**—The Revised Statutes provide that the Supreme Court shall have power to issue "writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a state, or an ambassador or other public minister, or a consul or vice-consul, is a party."[2] This provision limits the authority of the Supreme Court to certain cases. But another section of the statutes provides as follows: "The Supreme Court, and the circuit and district courts, shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."[3]

[1] Add. on Torts (Wood's ed.), § 1505; Reg. *v.* Chichester, etc., 29 L. J., Q. B. 23; *Ex parte* Briggs, 28 Id. 272; Commonwealth *v.* Denison, 24 How. 66.

[2] Rev. Stat. § 688.

[3] Rev. Stat. § 716. For form of writ of injunction, see *post*, No. 258.

The latter provision confers upon this court, and upon the circuit and district courts, authority to issue this writ, when it becomes necessary for the proper exercise of their jurisdiction.

In the former case the writ will issue from the Supreme Court in cases warranted by the principles and usages of the common law, only against federal courts or officers, where a state, or ambassador or other public minister, or a consul or vice-consul, is a party. Under the general principles of the common law the writ will not issue where there is any other appropriate remedy.[1] Thus, it will not be issued if the party aggrieved may have a remedy by writ of error or appeal,[2] as to compel an inferior court to reverse its judgment,[3] or to re-examine a judgment or decree,[4] or to compel the issuance of a mandamus which has been refused,[5] or to compel the reversal of any order, although it may seem to bear harshly and oppressively upon a party,[6] or to compel a court to quash a writ of execution,[7] or to vacate any order,[8] or to compel a judge to proceed according to the rules of chancery practice in a suit in equity even if he is proceeding in the case irregularly,[9] or to compel the allowance of an amendment.[10] Nor will the court, on general principles, issue a writ to control the inferior court or officer in the exercise of a discretion where the discretion is exercised, as in a case of a motion for a new trial,[11] or in case of the rejection of a bond offered for approval.[12]

§ 381. **Functions of the writ.**—It is the function and office of the writ to compel the performance of duties that are unquestionably right and proper to be performed, and not to control the judgment of the inferior court or officer in a matter of discretion, or where judgment has been exercised in a matter within the jurisdiction of the court or the proper scope of the powers or functions of the officer.[13]

[1] Crawford *v.* Addison, 22 How. 174.

[2] *Ex parte* Newman, 14 Wall. 152; *Ex parte* Schwaub, 98 U. S. 240; *Ex parte* Loring, 94 U. S. 418; *Ex parte* Flippin, 94 U. S. 348.

[3] *Ex parte* Taylor, 14 How. 3; *Ex parte* William Many, 14 How. 24.

[4] *Ex parte* Newman, 14 Wall. 152; *Ex parte* Schwaub, 98 U. S. 240; *Ex parte* Railroad Co., 103 U. S. 794.

[5] *Ex parte* De Groot, 7 Wall. 497.

[6] *Ex parte* Myra Clarke Whitney, 13 Pet. 404.

[7] *Ex parte* Flippin, 94 U. S. 348.

[8] *Ex parte* Loring, 94 U. S. 418.

[9] *Ex parte* Myra Clarke Whitney, 13 Pet. 404.

[10] *Ex parte* Wm. Many, 14 How. 24.

[11] Life and Fire Ins. Co. *v.* Wilson, 8 Pet. 291.

[12] *Ex parte* Milwaukee R. Co., 5 Wall. 188.

[13] *Ex parte* Cutting, 94 U. S. 14; *Ex parte* David Taylor, 14 How. 3; *Ex parte* Wm. Many, 14 How. 24; *Ex parte* Joseph Bradley, 7 Wall. 364; *Ex parte* Butting, 94 U. S. 14;

§ 382. **Where there is a discretion.**—Where there is an official judgment or discretion to be exercised, a writ of mandamus may issue to compel action in these respects, but it will not be allowed either to commend a particular judgment or to interfere with the exercise of the discretion.[1]

The refusal to exercise a discretion may constitute a proper case for the issuance of the writ; but where the mode of action is also in the discretion of the party against whom it is sought, it will not issue so as to interfere with such discretion.[2]

§ 383. **Instances where it has been issued.**—It has been held proper to issue the writ from a circuit court, on the ground of necessity for the exercise of its jurisdiction, to compel a municipal corporation to levy a tax to pay a judgment rendered by such court against the corporation;[3] to restore an officer to an office from which he has been unlawfully removed;[4] to compel an incumbent of an office to deliver up papers, property and the insignia of the office to his successor;[5] to compel a city council to pay certain necessary expenses authorized by the legislature;[6] to compel trustees to admit children to schools, where they are entitled to the right of attendance;[7] to compel a board of canvassers to make a

Arlington *v.* Van Huton, 44 Ala. 284; Reading *v.* Cummings, 11 Pa. St. 196; People *v.* Thompson, 25 Barb. 75; Fitch *v.* McDiarmid, 26 Ark. 482; Stub *v.* McCrillus, 4 Kans. 250; *Ex parte* Conway, 6 Tex. 457; People *v.* Board of Police, 26 N. Y. 316; School Ins. *v.* People, 20 Ill. 530.

[1] United States *v.* Lawrence, 3 Dill. 42; Railroad Co. *v.* Wiswall, 23 Wall. 507; *Ex parte* Bradstreet, 4 Pet. 102; s. c., 7 Id. 634; s. c., 8 Id. 588; Insurance Co. *v.* Comstock, 16 Wall. 270; Livingstone *v.* Dorgenois, 7 Cr. 577; *Ex parte* Crane, 5 Pet. 190; Appling *v.* Bailey, 44 Ala. 333; Matter of Nabor, 7 Ala. 459; Dixon *v.* Field, 10 Ark. 243; Manor *v.* McCall, 5 Ga. 522; Warden *v.* Town Council, 9 R. I. 128; Mayor *v.* Rainwater, 47 Miss. 547; People *v.* Judge, etc., 24 Mich. 408; *Ex parte* Newman, 14 Wall. 152; United States *v.* Seaman, 17 How. 225; United States *v.* Commissioners, 5 Wall. 553; Secretary *v.* McGarrahan, 9 Wall. 298.

[2] Id.; McDiarmid *v.* Fitch, 27 Ark. 106; McMullin *v.* State, 26 Id. 613; State *v.* Warmouth, 23 La. Ann. 76; East Boston Ferry Co. *v.* Boston, 101 Mass. 488; Commissioners *v.* Philadelphia, 3 Brewst. (Pa.) 596; *Ex parte* Smith, 44 Ala. 654; Appling *v.* Bailey, 44 Id. 333; 2 Add. on Torts (Wood's ed.), 719, *et seq.*; Life and Fire Ins. Co. *v.* Adams, 9 Pet. 573; *Ex parte* Poultney, 12 Pet. 472; *Ex parte* Taylor, 14 How. 3.

[3] United States *v.* Keokuk, 6 Wall. 516; Riggs *v.* Johnston Co., 6 Wall. 166; Wakeley *v.* Muscatine, Id. 481. See also Lower *v.* U. S., 91 U. S. 536; United States *v.* New Orleans, 98 U. S. 381.

[4] Drew *v.* Judges, 3 H. & M. (Va.) 1; People *v.* Board of Police, 35 Barb. 531; State *v.* Common Council, 9 Wis. 254.

[5] Walter *v.* Belding, 24 Vt. 658; Church *v.* Slack, 7 Cush. 226; Sudbury *v.* Stearns, 21 Pick. 148.

[6] Commissioners *v.* Philadelphia, 3 Brewst. (Pa.) 596.

[7] State *v.* Duffy, 7 Nev. 342.

complete canvass of all the returns received by them;[1] to compel a judge of an inferior court to sign a bill of exceptions in a case tried before him,[2] or to make up a record and give judgment thereon, so that a writ of error may be brought;[3] to compel a judge to enter a judgment rendered by his predecessors;[4] to compel a judge to enter a judgment on the report of a referee;[5] to compel a clerk to issue an execution on a judgment;[6] and generally to compel the performance of all ministerial duties on the part of officers, corporations and inferior courts, where there is no other adequate legal remedy by which the specific duty can be enforced, and the relator has a clear legal right to the performance of it, and the performance is refused.[7] Under the power conferred by the statute, the Supreme Court may issue this writ to the Court of Claims to compel it to hear and determine a motion for a new trial;[8] and to a district court commanding it to execute its decrees, notwithstanding the legislature of the state has attempted to annul them on the ground that the court had no jurisdiction.[9]

§ 384. **When a mandamus is necessary for the exercise of jurisdiction.**—Under section 716 of the Revised Statutes, the writ can only issue from the Supreme Court and the circuit and district courts in cases where it "may be necessary for the exercise of their respective jurisdictions agreeable to the usages and principles of the law." Under this provision the circuit court cannot grant it unless it is necessary for the exercise of its jurisdiction, although the parties are citizens of different states.[10] But the circuit court has a right, as we have noticed, to issue the writ against a municipal corporation to compel the levy of a tax to pay a judgment rendered against the corporation in said court,[11] as this is necessary for the

[1] Florida *v.* Gibbs, 13 Fla. 55.

[2] Porter *v.* Harris, 4 Coll. (Va.) 485; State *v.* Hull, 3 Cold. (Tenn.) 255; People *v.* Pearsons, 3 Ill. 189; *Ex parte* Crane, 5 Pet. 190.

[3] *Ex parte* Bradstreet, 7 Pet. 634.

[4] Life Insurance Co. *v.* Wilson, 8 Pet. 291.

[5] Russell *v.* Elliott, 2 Cal. 245.

[6] People *v.* Loucks, 28 Cal. 68.

[7] Nelson *v.* Justices, 1 Cold. (Tenn.) 207; People *v.* Green, 64 N. Y. 499; People *v.* Supervisors, Id. 600; Strong, Petitioner, 20 Pick. 484; Traver *v.* Commissioners, 17 Ala. 527; State Nicholson Pavement Co. *v.* Mayor, 35 N. J. 396; People *v.* Easton, 13 Abb. Pr. (N. S.) 159; People *v.* Supervisors, 12 Barb. 217; Railroad Co. *v.* Clinton Co., 1 Ohio St. 77; People *v.* Thompson, 64 N. Y. 600; People *v.* Thompson, 25 Barb. 73; People *v.* Head, 25 Ill. 325; People *v.* Hilliard, 29 Id. 418; High's Ex. Leg. Rem. Tit. Mand.

[8] *Ex parte* United States, 16 Wall. 699

[9] United States *v.* Peters, 5 Cr. 115.

[10] Wheeling *v.* Mayor, 1 Hughes 90; Bath Court *v.* Amy, 13 Wall. 244; Graham *v.* Norton, 1 Wall. 427.

[11] Riggs *v.* Johnston Co., 6 Wall. 166;

proper exercise of its jurisdiction. But a mandamus from the Supreme Court to a district court is not necessary for the exercise of the appellate jurisdiction of the court, except in prize cases, as the proper appellate court would be the circuit court.[1]

§ 385. **Practice and proceedings.**—The writ is either alternative or peremptory; and the first writ issued is usually an alternative one, requiring the party against whom it is issued to do the act or show cause why he does not, at some specified time and place. If the defendant appears and shows sufficient excuse, then the writ is dismissed; but if otherwise, or he makes default, then the peremptory writ issues commanding the act to be done.

But this does not appear to be the uniform practice in the Supreme or other federal courts. The relator sometimes proceeds by motion based upon an affidavit, for an order to show cause why the writ should not issue. The hearing on the motion is sometimes, if not generally, *ex parte*, and without notice to the party against whom it is sought. The order, if allowed, is served on the defendant, and requires him to appear and show cause against the issuing of the writ at a certain time and place, when he can have an opportunity to be heard and to controvert the statements in the relator's affidavit by counter affidavits.

Another mode of proceeding is by petition or complaint under oath, in which the relator sets forth the facts which entitle him to the writ, to which the attention of the court is called by motion, after due notice to the defendant of the time and place it will be heard, at which time he has an opportunity to defend, and may demur, move to quash, answer, or reply to the petition or complaint, as he may deem advisable.

§ 386. **When the writ will not issue.**—The writ of mandamus is not a proper process for the correction of erroneous judgments or decrees of the inferior court;[2] nor will it issue to compel such court to open up a judgment, after a refusal so to do in the exercise of a judicial discretion;[3] nor to restore a person to the office of attorney or counsellor of the court, after dismissal therefrom by a court

United States *v.* Johnson, 7 Cent. L. J. 130; United States *v.* New Orleans, 98 U. S. 381; Supervisors *v.* United States, 4 Wall. 435; Commissioners *v.* Aspinwall, 24 Howard 376; Weber *v.* Lee County, 6 Wall. 210.

[1] *Ex parte* Jesse Hoyt, 13 Pet. 279.

[2] *Ex parte* Hoyt, 13 Pet. 279; *Ex parte* Whitney, 13 Pet. 404; *Ex parte* Flippin, 94 U. S. 348; *Ex parte* Loring, Id. 418; *Ex parte* Railroad, 101 U. S. 711; Railroad Co. *v.* Alling, 99 Id. 463; *Ex parte* French, 100 Id. 5.

[3] *Ex parte* Many, 14 How. 24.

having jurisdiction of the matter;[1] nor to compel a court to set aside an order, duly entered, for the vacation of a judgment;[2] nor to compel a circuit court to proceed to execute a judgment from which an appeal has been duly taken to the Supreme Court;[3] nor to command a governor of a state to deliver up a fugitive from justice, under a requisition from the governor of another state;[4] nor can it perform the office of an appeal or writ of error.[5]

§ 387. **The general principles and practice applicable to all courts.** —The principles and practice generally applicable in case of mandamus are applicable to all courts, whether federal or state. The statute, as we have seen, gives the circuit and district courts power to issue the writ whenever necessary for the exercise of their respective jurisdictions, agreeable to the usages and principles of the common law. And whenever they have power for this purpose, the general principles and practice in such cases would be applicable; and the authorities we have cited, whether of the federal or state courts, will be equally applicable to any federal court, so far as they relate to the general doctrines and practice.

For form of writ, see *post*, No. 257.

[1] *Ex parte* Secombe, 19 How. 9. But this is otherwise where the court had no jurisdiction: *Ex parte* Bradley, 7 Wall. 364; *Ex parte* Robinson, 19 Wall. 505; *Ex parte* Garland, 4 Wall. 378.

[2] *Ex parte* Ransom, 20 How. 581.

[3] United States *v.* Addison, 22 How. 174.

[4] Governor of Kentucky *v.* Governor of Ohio, 24 How. 66.

[5] *Ex parte* Schwaub, 98 U. S. 240; *Ex parte* Railway Co., 103 U. S. 794.

CHAPTER XVII.

WRITS OF HABEAS CORPUS.

§ 388. **When federal courts may issue.**—The Supreme Court and the circuit and district courts, and the several justices and judges thereof within their respective jurisdictions, have power to grant writs of habeas corpus for the purpose of inquiry into the cause of restraint of liberty;[1] but they will not issue for such a purpose where the party for whose benefit it is invoked is a prisoner in jail, unless "he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under an alleged right, title, authority, privilege, protection or exemption claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."[2]

The application for the writ must be made by a complaint in writing, signed by the person for whose relief it is intended, and it must set forth the facts concerning the detention, in whose custody he is detained, and by virtue of what claim or authority he is detained, if known, and these facts must be verified by the oath of the person making the application.[3]

It will be noticed that the complaint must be signed by the party restrained of his liberty, who must verify it. This is imperative; and an application for the writ made by his friends, without the authority of the party for whom it is made, will be denied.

In 1844 Thomas W. Dorr was tried and convicted, in the supreme court of Rhode Island, for treason against that state, and sentenced to the state's prison for life. On motion for a writ of

[1] Rev. Stat. §§ 751, 752.
[2] Rev. Stat. § 753.
[3] Rev. Stat. § 754.

habeas corpus, in the Supreme Court of the United States, affidavits were read to show that personal access to Dorr was refused, in consequence of which his authority could not be obtained for an application for the writ; and it was urged that there was no other mode of ascertaining whether or not it was Dorr's wish that the case should be brought before this court. But the motion was denied, because no court of the United States or judge thereof can issue a habeas corpus to bring up a prisoner who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness; and because it did not appear that the application was made by authority of Dorr or at his request.[1] The authority of a commissioner to issue a writ of habeas corpus, to take from jail a person committed by authority of the United States, and to bring him before him for the purpose of giving his deposition, to be used in a district court, has been denied;[2] and even the power of a judge or a justice of a United States to issue the writ in vacation, for the purpose of bringing the witness into court at an approaching term, has been questioned.[3]

For form of application, writ and return, see *post*, Nos. 262, 263, 264.

§ 389. **Provisions of the statute; habeas corpus and certiorari.**— The provisions of the Revised Statutes above cited are a substantial re-enactment of the previous statutory provisions regulating the procedure in cases of habeas corpus, and they afford a plain guide in those cases to the proper practice where the original jurisdiction of the federal courts is invoked. The case of *Ex parte* Lange[4] will illustrate the practice in such cases, as well as the general principles of the law relating to this subject. The petitioner had been indicted, tried and convicted in the circuit court of the United States for the southern district of New York, for stealing, purloining, embezzling and appropriating to his own use certain mail-bags belonging to the Post-Office Department. The value of the bags, as

[1] *Ex parte* Dorr, 3 How. 103 (1845). This decision was made previous to the act of February 5, 1867, which expressly provided that the application should be made in writing, and the facts verified by the oath of the applicant. This act, in respect to the application, is substantially re-enacted by § 754 of the Revised Statutes: *In re* Hoyle, 9 A. L. Rec. 65. But see *In re* Ferrens, 3 Ben. 442, where it was held that the wife of the party in custody could make application for his discharge.

[2] *Ex parte* Barnes, 1 Sprague 133.

[3] Conkling Pl. 247.

[4] 18 Wall. 163.

found by the jury, was less than twenty-five dollars, the punishment for which, as provided by statute, was imprisonment for not more than one year or a fine of not less than ten dollars nor more than two hundred dollars. The presiding judge sentenced the petitioner under said conviction to one year's imprisonment and to pay a fine of two hundred dollars, and he was committed to jail on said sentence, but on the day following his commitment his fine was paid to the clerk of the court, who subsequently paid the same into the treasury of the United States. The petitioner was the next day thereafter brought before the same judge on a writ of habeas corpus, when an order was entered vacating the former judgment, and he was again sentenced to one year's imprisonment from that date, and the return of the marshal showed that he held the prisoner under the latter sentence.

All this was done during the term at which he was tried and convicted. The habeas corpus issued by the circuit judge was returned into the circuit court and two district judges sat with him on the hearing, and the writ was discharged and the petitioner remanded to the custody of the marshal.

A petition was afterwards filed by the prisoner in the Supreme Court of the United States, praying for a writ of habeas corpus to said marshal, on the ground that he was unlawfully imprisoned under the order of said circuit court, on consideration of which that court was of opinion that the facts aforesaid, which he alleged therein, fairly raised the question whether the circuit court had not in the last aforesaid sentence, under which the prisoner was held, exceeded its powers; and it directed a writ to issue, and also a writ of certiorari to bring up the record in the circuit court under which the petitioner was restrained of his liberty. On a final hearing of the case the court decided that although it had no authority to review the judgments of inferior courts in criminal cases by the use of the writ of habeas corpus or otherwise,[1] yet it had power to look into the record of a case to determine whether the court had any power to render the judgment complained of, and to ascertain whether or not the court had exceeded its authority.[2]

[1] United States *v.* Moore, 3 Cr. 170; Durousseau *v.* United States, 6 Cr. 307; *Ex parte* Kearney, 7 Wh. 42; *Ex parte* Watkins, 3 Pet. 193; Forsyth *v.* United States, 9 How. 571; *In re* Kaine, 14 How. 103; *Ex parte* Gordon, 1 Black 505.

[2] United States *v.* Hamilton, 3 Dall. 17; *Ex parte* Burford, 3 Cr. 448; *Ex parte* Bollman, 4 Cr. 75; *Ex parte* Wat-

On the question whether the court had authority to pass the second sentence under which the prisoner was held, the Supreme Court decided that the court below could not vacate the former judgment and impose another punishment on the prisoner; that the prisoner having paid into court the fine imposed upon him, and the money having passed beyond the control of the court, and the prisoner having also served several days of his imprisonment, all under a valid judgment, the court could not impose another punishment on the prisoner, as that would be to punish him twice for the same offence. The court said: "The law authorizes imprisonment not exceeding one year *or* a fine not exceeding two hundred dollars. The court through inadvertence imposed both punishments when it could rightfully impose but one. After the fine was paid and passed into the treasury, and the petitioner had suffered five days of his one year's imprisonment, the court changed its judgment by sentencing him to one year's imprisonment from that time. If this latter sentence is enforced it follows that the prisoner in the end pays his two hundred dollars fine and is imprisoned one year and five days, being all that the first judgment imposed on him and five days imprisonment in addition." The prisoner was therefore discharged.

§ 390. **The writ not of course; jurisdiction must be shown.**—We have noticed that the issuance of the writ is not a matter of course. The court, in the exercise of original jurisdiction, may in a proper case issue the writ, but it should first appear that the court has power in the case to act; and where the cause of the imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged.[1] This would be equivalent to a decision on a demurrer to the petition.

§ 391. **Allowance, direction and return of the writ.**—It is the duty of the court or judge to whom the application is made to award the writ forthwith, unless it appears from the petition itself

kins, 3 Pet. 193; *Ex parte* Watkins, 7 Pet. 568; *Ex parte* Metzger, 5 How. 176; *Ex parte* Kaine, 14 How. 103; *Ex parte* Wells, 18 How. 307; *Ex parte* Milligan, 4 Wall. 2; *Ex parte* McCardle, 6 Wall. 318; *Ex parte* McCardle, 7 Wall. 506; *Ex parte* Yerger, 8 Wall. 85.

[1] *Ex parte* Milligan, 4 Wall. 2; *Ex parte* Milburn, 9 Pet. 704; *Ex parte* Watkins, 3 Pet. 192; *Ex parte* Kinney, 3 Hughes 9.

that the applicant is not entitled to it; and it should be directed to the person in whose custody the party is detained.[1]

The party to whom it is directed should make due return thereof within three days thereafter, unless he be detained beyond the distance of twenty miles from the place where the return is required. If beyond that distance, and not more than one hundred miles, he is allowed ten days to make return; and if beyond the distance of one hundred miles, twenty days; and in making it he must certify the true cause of the detention, and bring the body of the person detained before the judge who granted the writ.[2]

When the writ is returned it is the duty of the court or judge to set a time for a hearing of the cause not exceeding five days thereafter, unless the party petitioning requests a longer time. The facts set forth in the return may be denied by the petitioner, or he may allege other facts that may be material to the case, but they must be under oath, and the return and all answers or denials may be amended by leave of the court or justice, or the judge, so as to present the material facts. The proceeding is in a summary way to determine the facts of the case; and after hearing the testimony and the arguments, the court or judge will dispose of the petitioner as law and justice requires.[3]

If a party is held under a sentence of a court that had jurisdiction of the case; the petitioner cannot be released though there are errors in the proceedings.[4] And if a party has been committed for an alleged contempt of a court of competent jurisdiction, or by a court-marshal that had jurisdiction in the case, and it was within the sphere of its authority, he cannot be released on habeas corpus; nor can an inquiry be made into the sufficiency of the causes of the commitment.[5]

But if a party is imprisoned by the sentence of a court or a judge or a magistrate, and the sentence is void for want of authority to pronounce it, as where the law under which the prosecution was instituted was unconstitutional and void; or where there was no authority for the magistrate, commissioner or other person to cause

[1] Rev. Stat. § 755; *Ex parte* Watkins, 3 Pet. 193; *Ex parte* Milligan, 4 Wall. 2.

[2] Rev. Stat. §§ 756, 757, 758.

[3] Rev. Stat. §§ 760, 761.

[4] Johnson *v.* U. S., 3 McLean 89; *Ex parte* Parks, 93 U. S. 18; *Ex parte* Siebold, 100 U. S. 371.

[5] *Ex parte* Kearney, 7 Wh. 38; *Ex parte* Reed, 100 U. S. 13.

the arrest or imprisonment of the party, then there is ground for a discharge upon a hearing of the habeas corpus.[1]

§ 392. **Proceedings governed by the common law.**—The proceedings upon the writ in the federal courts are governed by the common law of England, as it existed at the time of the adoption of the Constitution, except in respect to changes made by acts of Congress.[2] According to the doctrines of the common law, the decision of one court or magistrate refusing to discharge a prisoner was no bar to the issuing of other writs by other courts or magistrates having authority in such cases. And in case of a second or third investigation or inquiry into the cause of the detention, the court or magistrate can discharge the prisoner in the exercise of independent powers, notwithstanding his discharge may have been refused by other courts or magistrates on other writs.[3] Thus, where a person was arrested under an extradition treaty between the United States and Great Britain, and committed by a commissioner duly authorized to hear and determine the sufficiency of the charge made, and then a habeas corpus was sued out by the prisoner before a circuit court of the United States, which after a hearing dismissed the writ and remanded the prisoner, it was held that this was no bar to an inquiry by a justice of the Supreme Court of the United States upon a writ of habeas corpus issued by him, to inquire into the legality of the detention of the prisoner under such commitment.[4]

§ 393. **The court cannot inquire into the facts of the case.**—Under the provisions of the Revised Statutes relating to the writ, it was urged in a recent case that, whatever may have been the law or the practice prior to its enactment, the courts now have power, on a return to the writ, to inquire into the merits of the case; that, taking into consideration all these provisions, it was the duty of the court to ascertain the facts on which the party is held, and to decide as an original question whether the prisoner ought to be held in custody, without regard to the previous decision of the court or magistrate by whose order he was committed. But the court de-

[1] *Ex parte* Lange, 18 Wall. 163; *Ex parte* Siebold, 100 U. S. 371; *Ex parte* Randolph, 2 Brock. 447; *Ex parte* Davis, 14 L. R. 301; *In re* Farez, 7 Blatch. 345.

[2] *Ex parte* Watkins, 3 Pet. 193; *Ex parte* Randolph, 2 Brock. (C. C.) 447.

[3] *Ex parte* Kaine, 3 Blatch. (C. C.) 1; *Ex parte* Partington, 13 Mee. & W. 679; Canadian Prisoners' Case, 5 Id. 32; The King *v.* Luddis, 1 East. 306; Burdett *v.* Abbott, 14 Id. 91; Walson's Case, 9 A. & E. 731.

[4] *Ex parte* Kaine, 3 Blatch. (C. C.) 1.

cided that where a party was held on process issued on a final judgment of a court or on the order of an examining magistrate, it had no authority to inquire into the evidence which led to the conviction or detention of the party; that in determining upon habeas corpus the "facts" of the case, the court could not inquire into the facts which constitute the crime for which the party is convicted or detained; that it could not retry the case, but only consider whether the court or magistrate acquired jurisdiction of the matter, or whether they exceeded their jurisdiction, and whether they had any legal or competent evidence of facts before them on which to base a judgment as to the guilt of the accused.[1]

Questions of this character have most frequently been presented in the execution of judicial duties under extradition treaties, where the person is held in custody under a commitment by a commissioner. The decision in the case last cited followed the current of previous decisions on this subject. Thus in *Ex parte* Van Aernam[2] it was held that the circuit court could not sit in review on the merits of the decision made by a commissioner in an extradition case, in respect to either the facts or the law.[3] But the decisions on this question have not been entirely clear or harmonious.[4] In a case just cited,[5] Judge Blatchford reviewed the decisions and furnished an able exposition of the law on this subject. He observes: "The court issuing the writ must inquire and adjudge whether the commissioner acquired jurisdiction of the matter by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction, and whether he had any legal or competent evidence of facts before him on which to exercise a judgment as to the criminality of the accused. But such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusions." Under this decision error in law in the admission or exclusion of evidence before the commissioner

[1] *In re* Joseph Stupp, 12 Blatch. (C. C.) 501 (1875); *In re* Frazer, 7 Id. 34; *In re* Macdonnell, 11 Id. 170; *In re* Stupp, Id. 124; *Ex parte* Geissler, 4 Fed. Rep. 188; *In re* Doig, Id. 193.

[2] 3 Blatch. (C. C.) 160.

[3] See also *In re* Ventremaitre, 9 N. Y. Leg. Obs. 137; *In re* Heilbron, 12 Id. 65.

[4] *In re* Heinrich, 5 Blatch. (C. C.) 414, where it was held that in such cases the court could not only look into and pass upon the competency of evidence, but also its weight. See also *In re* Kaine, 14 How. 142.

[5] *In re* Joseph Stupp, *supra*. While in custody under a writ of habeas corpus he cannot be arrested on a second warrant: *In re* Francois Farez, 7 Blatch. 345.

would not be considered, provided there was any legal or competent evidence of facts on which to base the judgment.

§ 394. **Appeals to the circuit court.**—Section 763 of the Revised Statutes provides for appeals, in certain cases, to the circuit courts as follows: "From the final decisions of any court, justice or judge inferior to the circuit court for the district in which the cause is heard:

"1. In the case of any person alleged to be restrained of his liberty in violation of the Constitution or of any law or treaty of the United States.

"2. In the case of any prisoner who, being a subject or citizen of a foreign state and domiciled therein, is committed, or confined, or in custody by or under the authority or law of the United States, or of any state, or process founded thereon, for or on account of any act done or omitted under an alleged right, title, authority, privilege, protection or exemption set up or claimed under the commission, order or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof." Except in the cases provided therein, no appeal lies to a circuit court from a decision of the district court on an application for a habeas corpus.[1]

§ 395. **Appeal to the Supreme Court.**—It is further provided by section 764 of the Revised Statutes that an appeal may be taken from the final decision of a circuit court, in the cases mentioned in the last clause of the preceding section.

Under the provisions of former acts of Congress, substantially embodied in the foregoing sections, it has been held that, notwithstanding the provision made for appeal to the Supreme Court from the final decision of the circuit court, on habeas corpus, brought to such court by appeal from the decision of a "court, justice or judge inferior to the circuit court," they did not exclude the appellate jurisdiction of the Supreme Court in cases where the circuit court exercised original jurisdiction on habeas corpus.[2] Although the limitation made by section 764 of the Revised Statutes would cut off any right of appeal of cases described in the first clause of the preceding section, it would not affect the right of appeal in those cases where the circuit court exercised original jurisdiction.

[1] Seavy *v.* Seymour, 3 Cliff. 439. (1867); *Ex parte* Yerger, 8 Wall. 85
[2] *Ex parte* McCardle, 6 Wall. 318 (1868).

They would fall within the reason and the principle of the cases last cited, and the right to an appeal would be clear. In *Ex parte* McCardle, Chase, C. J., who gave the opinion of the court, observed: "From decisions of a judge or a district court appeals lie to the circuit court, and from the circuit court court to this court. But each circuit court, as well as each district court and each judge, may exercise the original jurisdiction; and no satisfactory reason can be assigned for giving appeals to this court from the circuit court rendered on appeal, and not giving like appeals from judgments of circuit courts rendered in the exercise of original jurisdiction. If any class of cases was to be excluded from the right of appeal, the exclusion would naturally apply to cases brought into the circuit court by appeal rather than to cases originating there. In the former description of cases the petitioner for the writ, without appeal to this court, would have the advantage of at least two hearings, while in the latter, upon the hypothesis of no appeal, the petitioner would have but one."[1]

This interpretation of the statutes was followed in *Ex parte* Yerger,[2] where the broad proposition was maintained that the appellate jurisdiction of the Supreme Court in such cases was conferred by the Constitution, except such as come within some limitations of the jurisdiction by acts of Congress; and there being no such limitation applicable to appeals from the original cognizance of the circuit court in habeas corpus cases, that court could entertain jurisdiction of such appeals. In this case the court further held that on appeals it had jurisdiction to inquire into the lawfulness of the detention and relieve from it if found unlawful, even where the detention complained of was not by virtue of civil authority nor under the order of an inferior court, but by military officers for a trial before a military tribunal, and after an examination into the cause of the detention by the inferior court, resulting in an order remanding the prisoner to custody.

§ 396. **In cases involving the law of nations.**—It is further provided that "when a writ of habeas corpus is issued in the case of any prisoner who, being a subject or citizen of a foreign state and domiciled therein, is committed or confined or in custody by or

[1] As to the power of the Supreme Court and of district and circuit courts, and the justices and judges thereof, to issue writs of habeas corpus in the exercise of original jurisdiction, see Rev. Stat. §§ 751, 752; *ante*, § 389.

[2] *Supra.*

under the authority or law of any one of the United States, or process founded thereon, on account of any act done or omitted under any alleged right, title, authority, privilege, protection or exemption, claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations, notice of the said proceeding, to be prescribed by the court or justice or judge at the time of granting said writ, shall be served on the attorney-general or other officer prosecuting the pleas of said state, and due proof of such service shall be made to the court or judge before the hearing." [1]

§ 397. **Appeals, how taken.**—Appeals on habeas corpus can only be taken on "such terms and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison, or confined, or restrained from his liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as may be prescribed by the Supreme Court, or, in default thereof, by the court or judge hearing the cause." [2] And pending the proceedings or appeal, "and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any state court, or by or under the authority of any state court, or by or under the authority of any state, for any matter so heard and determined, or in process of being heard and determined, under such writ of habeas corpus, shall be deemed null and void." [3]

[1] Rev. Stat. § 762.
[2] Rev. Stat. § 765.
[3] Rev. Stat. § 766.

CHAPTER XVIII.

COURT OF CLAIMS—JURISDICTION, PLEADING, PRACTICE AND PROCEDURE.

§ 398. **A fundamental principle: governments or sovereignties cannot be sued.**—It is a familiar doctrine of the common law that a state, nation or sovereignty cannot be sued in its own courts without its consent.[1] It is manifest, however, that all civilized nations must, in the usual course of their affairs, enter into contracts, and, in the execution of their various functions and duties, become justly liable to private persons and corporations. Previous to the act of Congress of February 24, 1855, the only remedy for a party having a claim against our government was by petition to Congress for special legislative action in the particular case, and if granted, a particular appropriation was necessary to satisfy the same. The act providing for a Court of Claims was passed to remedy a great mischief, to avoid many grievous wrongs, and to promote justice, and it has been liberally construed to accomplish the object intended.[2] It provided for the organization and sessions of a Court of Claims, and gave it jurisdiction to hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, and all claims which might be referred to it by either house of Congress;[3] and it made further provisions for practice and procedure in said court.[4]

[1] "Immunity from suit is an incident of sovereignty:" Mr. Justice Daniels, in Bonner *v.* United States, 9 Wall. 156; United States *v.* McLemore, 4 How. 286.

[2] Brown *v.* The United States, 6 Ct. C. C. 171.

[3] Act Feb. 24, 1855, c. 122, s. 1, v. 10, p. 612.

[4] A statement of the causes which led to the establishment of the Court of Claims, and an interesting and succinct history of the same, has been prepared by the Hon. William A. Richardson, one of the judges of the court, and published in the Southern Law Review.

He says: "Previous to the year eighteen hundred and fifty-four the accumulation of private claims against the government of the United States presented to Congress for examination and relief had, at various times, engaged the attention of senators and representatives. It was seen and acknowledged by them all that it was beyond the power of Congress or its committees to make a thorough investigation of those claims, or to act intelligently upon the large and con-

Since the original act providing for this court was adopted, additional powers have at various times been conferred upon it, and additional

stantly increasing number of petitions introduced at each session in behalf of persons having claims of various kinds for which they sought relief. Claimants had gone to Congress, and would continue to go there, as a matter of right secured to them by the first article of the amendments to the Constitution of the United States, guaranteeing to the people the privilege to petition the government for redress of grievances.

"It was seriously felt both in and out of Congress that the constitutional guaranty was of little value, and was substantially violated if private claimants against the government were allowed merely the naked right to have their petitions presented, without any further investigation and consideration.

"To neglect to hear petitioners, or not to act upon their complaints when heard, was practically the same to them as would be the effect of a law expressly abridging the right of petition in direct and flagrant violation of the Constitution.

"And yet such was the extent of these claims, and the difficulty of reaching the real facts in each case, that few of them were ever acted upon, and many honest creditors of the United States were turned away without a hearing, and others were deterred from presenting their petitions for redress by the difficulties in the way of ever reaching a final determination, while it was occasionally found that, upon hasty consideration or imperfect *ex parte* evidence, a claim was allowed and paid which was, to say the least, of doubtful validity.

"Committees could not constitute themselves courts for the trial of facts. They had not the time to devote to that kind of investigation, to the interruption or exclusion of their duties to the country on the great national questions which were always pending in Congress. They could not effectively examine the claimants' witnesses to any great extent before themselves, and they were not sufficiently familiar with the matters in controversy to be able to procure witnesses for the government. Claimants, in fact, presented only *ex parte* cases, supported by affidavits and the influence of such friends as they could induce to appear before the committees in open session, or to see the members in private. No counsel appeared to watch and defend the interest of the government. Committees were, therefore, perplexed beyond measure with this class of business, and most frequently found it more convenient and more safe not to act at all upon those claims which called for much investigation, especially when the amounts involved seemed large. Moreover, when bills for relief in meritorious cases were reported, few of them were acted upon by either house, or, if passed by one, were not brought to a vote in the other house, and so fell at the final adjournment, and if ever revived, had to be begun again before a new Congress and a new committee, and so on year after year and Congress after Congress.

"Several plans for relief were from time to time proposed by bills, resolutions or motions, or were suggested by senators and representatives in the course of debate. But no measure was carefully and fully considered until the second session of the Thirty-third Congress, in the year eighteen hundred and fifty-four.

"On the sixth of December of that year Senator Brodhead, of Pennsylvania, in pursuance of previous notice, asked and obtained leave to introduce a bill establishing a commission for the examination and adjustment of private claims, which was read a first and second time by its title and referred to the Committee on Claims. This was a carefully-drawn and well-prepared bill. It had evidently been considered by members of the committee and had their concurrence before its introduction, for it was soon reported back without amendment. When the

regulations made as to practice and procedure therein; and a large amount of business is now annually transacted by it.

bill came up for discussion in the Senate, it soon became apparent that the prevailing opinion of members was that something more was needed than a mere commission, with its members appointed for a term of years, or removable at the pleasure of the Executive. It was seen that there would be frequent changes of commissioners with the change of parties on the incoming of new administrations, and that with the constant liability of removal the independence of the commissioners would be greatly weakened and their usefulness much impaired. Besides, men of ability and learning in the law would not give up their position and practice to accept such semi-judicial offices, subject to removal at any time. The desire expressed was to have an independent and permanent tribunal, which should pass upon the claims made against the government with all the formalities, safeguards and judicial learning which distinguish courts of justice established for the trial of causes between individuals.

"Senator Hunter, of Virginia, suggested some amendments and proposed the appointment of judges with life tenure, instead of commissioners, as the best means of securing that complete independence which it was important to establish, and of obtaining the best men to fill the positions. He said:

"'When these safeguards are provided, I think we should establish the most admirable tribunal for doing justice to private claimants, and, at the same time, for throwing proper checks about the treasury of the United States, that could be established.'

"After this discussion the bill was referred on the 18th of December, 1854, to a select committee composed of Senators Brodhead of Pennsylvania, Jones of Tennessee, Hunter of Virginia, Clayton of Delaware and Clay of Alabama. On the 20th of December this committee reported a substitute entitled 'An act to establish a court for the investigation of claims against the United States.' This bill differed from the former one very little, except in the important feature of establishing a permanent and independent court instead of a commission. The bill thus drawn met the approval of the Senate, and on the 21st of December it passed that body without a vote recorded against it.

"The bill reached the House of Representatives on the 24th of December, and was referred first to the judiciary committee, but this reference was changed, and it was sent to the committee on claims. It was soon reported back with some amendments which did not alter the main features of the bill, and was passed by the House on the 23d of February, 1855, by a vote of 150 to 46. Two days after, February 25, the bill was signed by the President and became a law.

"The act required the appointment of three judges by the President, by and with the advice and consent of the Senate, to hold their offices during good behavior. President Pierce appointed two of them on the 3d of March, and the other on the 8th of May, 1855. They organized on the 11th of May, 1855, making choice of Judge Gilchrist as presiding judge, and immediately entered upon the discharge of their duties.

"The magnitude and difficulties of the business of the court, with its peculiar jurisdiction, are well presented in a report made to Congress by Judge Gilchrist, for himself and his associates, bearing date June 23, 1856, from which the following extracts are taken:

"'As to the business of the court, we are convinced that no one who has not had personal experience on the subject can have any correct idea of its diversity, its intricacy, its perplexity, the exhausting labor necessary for its investigation, or the large sum of money it involves. Until the institution of this court, there had never been anything like a systematic inquiry

We will now proceed to consider the organization of said court and its sessions, after which we will treat of its present jurisdiction, and of pleading, practice and procedure therein.

into the modes of action by the government through the executive departments, or the relation in regard to contracts and the liabilities arising therefrom which the government bore to the citizens. It was inevitable, and it is astonishing that it should not have been sooner perceived, that among twenty-five millions of people, inhabiting the almost boundless territory comprehended by the Union, innumerable questions of the most difficult and delicate nature must have arisen, delays in the decision of which were alike discreditable to the moral sense of the people, and the public faith of the government, of which the people were the foundation. It has been often asserted and proved by the experience of the British Parliament that legislative bodies are unfitted, by the pressure of great public interests, for careful judicial investigation into private rights. The consequence has been in our country that claims accumulated until their magnitude repressed all willingness to investigate them, and a state of things arose which made it hopeless almost to present a claim against the United States with any prospect of a decision. Such was the condition of affairs when we entered upon the discharge of our duties. Our field of action was entirely new. We had no precedents to guide us. It was necessary at once to adopt some system of rules for the transaction of business. The ordinary rules of practice in courts of law were obviously inapplicable. We were forced to adopt rules in advance of any experience upon the subject, conscious that we should be forced often to modify and sometimes to abrogate them. We found numerous cases involving questions entirely out of the path of ordinary legal investigation, requiring a degree of care and study rarely necessary in courts of justice. Cases of contracts, intricate in their details, imperfectly defined by the evidence, reducible with difficulty to any legal principles, and enormous in amount, met us at the threshold. Cases involving the proper construction of treaties, important questions of public law, and that most difficult and delicate of all questions, the responsibility of the United States to their citizens, were laid before us. The construction of acts of Congress, the legitimate powers of the executive departments, the duties and liabilities of government officers, the constitutional powers of the general government, the duties of neutral nations, and questions arising out of a state of war, were all, directly or incidentally, to be inquired into. It cannot be presumed that, with a due regard to our own reputation or to our official oaths, we were disposed to pass lightly upon questions of such momentous importance. Our object has been to give each case such a degree of care and patient attention as would enable us to use it as a precedent in subsequent cases of a like character. Our desire has been, not to get rid of the cases, but to decide them; and in order to do that they must be carefully examined.'

"The original act provided that at the commencement of each session of Congress, and at the commencement of each month during the session, the court should report the cases upon which they should have finally acted, stating in each the material facts which they found established by the evidence, with their opinion in the case, and the reasons upon which such opinion was founded, and the opinion of any judge who should dissent from the majority. It also directed the court to prepare a bill or bills in those cases which received the favorable decision thereof in such form as, if enacted, would carry the same into effect. These provisions might perhaps have accomplished the desired result, and have proved satisfactory, had they not been accompanied with others which delayed and embarrassed the proceedings thereon in Congress, and, to a large extent, actually pre-

§ 399. **Organization and sessions of the Court of Claims.**—In regard to the organization and sessions of the Court of Claims, the Revised Statutes provide as follows:

JUDGES.—*Sec.* 1049. The Court of Claims, established by the

vented any final action whatever. It required the court to transmit, with the reports, the briefs of the solicitor for the government and of the claimant, and the testimony in each case.

"The claims reported upon adversely were, by the terms of the act, to be placed on the calendar; and all reports and bills from the court were to be continued from session to session, and from Congress to Congress, until finally acted upon. But claims reported favorably upon, and the accompanying bills, were not required to be placed upon the calendar. At the very outset, when the first report came in, the question arose as to what was to be done with the favorable reports and bills. It was decided to refer them to the committee on claims, and that course was ever after followed while the system of reporting to Congress continued.

"The committee on claims finding a mass of evidence, with the briefs in each case, referred to them, very naturally felt that it was their duty to go carefully over the whole matter, to read all the evidence, and to examine the briefs of the claimant and of the solicitor for the government. Claimants were uneasy and pressing, and the troubles and perplexities of the members of the committee were numerous. To hear the cases anew, or to examine all the papers in each case and submit the questions which were raised on the facts and the law to the decision of the committee, would require more time and labor of the members than it was possible to devote to such duty. If the work which the court had done was thus to be all gone over again in committee, little was gained by reference to the court at all. In fact it was a positive loss and injury to the claimants, because they were forced to try their cases twice, while neither Congress nor claimants obtained relief. Favorable reports were often not concurred in or not acted upon at all, and were finally lost altogether.

"This was not what the friends of the act establishing the court intended, nor what they hoped and expected to accomplish. In discussing the original bill in the Senate in December, 1854, Senator Hunter, of Virginia, had said: 'I take it for granted that there would scarcely be a case in which Congress would not concur in the decision of a court thus established.' It was no doubt supposed, as was said at a later date by a member of the House from Pennsylvania, that the bills reported by the court would be read over by the committee simply to 'see whether there was anything contained in them which might be considered as trenching on the privileges or rights of the House, and if there were not, that they might be reported back for the House to act on them.'

"It was not foreseen that the committee would feel reluctant to take the responsibility of reporting back the bills without examination of the evidence upon which they were founded, evidence which the law required should be submitted to Congress, and which had been referred to them by vote of the House. Such was the inevitable consequence of laying the whole record in each case before Congress, and it defeated one great object of the act establishing the court, that of relieving Congress from the consideration of private claims upon the evidence. When this became apparent from actual experience, Congress, ever ready as it has been to sustain and increase the usefulness of the court, made important and radical changes and improvements in the organic act.

"On the 3d of March, 1863, an amendatory act was passed, of which the most material alterations were these:

"Two additional judges were added

act of February 24, 1855, shall be continued. It shall consist of a chief justice and four judges, who shall be appointed by the President, by and with the advice and consent of the Senate, and hold their offices during good behavior. Each of them shall take an oath to support the Constitution of the United States and to discharge faithfully the duties of his office, and shall be entitled to receive an annual salary of four thousand five hundred dollars, payable quarterly from the treasury.

SEAL.—*Sec.* 1050. The Court of Claims shall have a seal, with such device as it may order.

COURT-ROOMS, ETC., HOW PROVIDED.—*Sec.* 1051. It shall be the duty of the Speaker of the House of Representatives to appropriate such rooms in the Capitol at Washington, for the use of the Court of Claims, as may be necessary for their accommodation, unless it appears to him that such rooms cannot be so appropriated without interfering with the business of Congress. In that case the court shall procure, at the city of Washington, such rooms as may be necessary for the transaction of their business.

to the court, making the number five. An appeal was allowed to the Supreme Court by either party where the amount should exceed three thousand dollars, and by the defendants in other cases. Every judgment was to be paid 'out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the Court of Claims, and signed by the Chief Justice, or in his absence by the presiding judge.' Interest was to be allowed upon judgments in certain cases in favor of claimants, when on appeal to the Supreme Court the same should be affirmed. The former requirement that the court should send to Congress the records, evidence, judgments and bills was done away with.

"These provisions still stand as the existing law.

"Some other amendments were made by the act relating to jurisdiction which we shall refer to hereafter, and others in relation to details of less consequence.

"The last section of the act led to some difficulty. It provided that no money should be paid out of the treasury for any claim passed upon by the court till after an appropriation therefor should be estimated for by the Secretary of the Treasury. The Supreme Court held that this authority given to the head of an executive department, by necessary implication, to revise the decision of the Court of Claims requiring the payment of money, denied to it the judicial power from the exercise of which appeals could be taken to that court, and they refused to take jurisdiction of any appeals from the Court of Claims. When that decision was promulgated, Congress, in March, 1866, repealed the section referred to, and the Supreme Court has ever since entertained jurisdiction of such appeals.

"From that time the business of the court has gone on smoothly, with no other difficulties than those incident to the trial and investigation of cases of such magnitude, involving such intricate and peculiar questions as do those which come before this court."

SESSIONS.—*Sec.* 1052. The Court of Claims shall hold one annual session, at the city of Washington, beginning on the first Monday in December and continuing as long as may be necessary for the prompt disposition of the business of the court.

QUORUM.—And any two of the judges of said court shall constitute a quorum, and may hold a court for the transaction of business.[1]

OFFICERS OF THE COURT.—*Sec.* 1053. The said court shall appoint a chief clerk, an assistant clerk if deemed necessary, a bailiff and a messenger. The clerks shall take an oath for the faithful discharge of their duties, and shall be under the direction of the court in the performance thereof; and for misconduct or incapacity they may be removed by it from office; but the court shall report such removals, with the cause thereof, to Congress, if in session, or, if not, at the next session. The bailiff shall hold his office for a term of four years, unless sooner removed by the court for cause.

SALARIES OF CLERKS, BAILIFF AND MESSENGER.—*Sec.* 1054. The salary of the chief clerk shall be three thousand dollars a year, of the assistant clerk two thousand dollars a year, of the bailiff fifteen hundred dollars a year, and of the messenger eight hundred and forty dollars a year, payable quarterly from the treasury.

CLERK'S BOND.—*Sec.* 1055. The chief clerk shall give bond to the United States in such amount, in such form and with such security as shall be approved by the Secretary of the Treasury.

CONTINGENT FUND.—*Sec.* 1056. The said clerk shall have authority, when he has given bond as provided in the preceding section, to disburse, under the direction of the court, the contingent fund which may from time to time be appropriated for its use; and his accounts shall be settled by the proper accounting officers of the treasury in the same way as the accounts of other disbursing agents of the government are settled.

REPORTS TO CONGRESS; COPIES FOR DEPARTMENTS, ETC.—*Sec.* 1057. On the first day of every December session of Congress, the clerk of the Court of Claims shall transmit to Congress a full and complete statement of all judgments rendered by the court during the previous year, stating the amounts thereof and the parties in whose favor they were rendered, together with a brief synopsis of

[1] The act of 1874, ch. 468, requires three judges to make a quorum or enter any judgment.

the nature of the claims upon which they were rendered. At the end of every term of the court he is required to transmit a copy of its decisions to the heads of departments; to the Solicitor, the Comptrollers and the Auditors of the Treasury; to the Commissioners of the General Land-Office and of Indian Affairs; and to the chiefs of bureaus, and to other officers charged with the adjustment of claims against the United States.

MEMBERS OF CONGRESS NOT TO PRACTICE IN THE COURT.—*Sec.* 1058. Members of either house of Congress shall not practice in the Court of Claims.

§ 400. **Jurisdiction, pleading, practice and procedure of the Court of Claims.**—The Revised Statutes and the amendments thereof provide as follows in reference to the jurisdiction, powers and procedure of the Court of Claims:

JURISDICTION OF CLAIMS FOUNDED ON STATUTES OR CONTRACTS, OR REFERRED BY CONGRESS.—*Sec.* 1059. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, and all claims which may be referred to it by either house of Congress.

JURISDICTION OF SET-OFFS AND COUNTER-CLAIMS OF UNITED STATES.—Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government of the United States against any person making claim against the government in said court.

JURISDICTION OF CLAIMS OF DISBURSING OFFICERS FOR LOSSES, ETC.—Third. The claim of any paymaster, quartermaster, commissary of subsistence or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of capture or otherwise, while in the line of his duty, of government funds, vouchers, records or papers in his charge, and for which such officer was and is held responsible.

JURISDICTION OF CLAIMS FOR CAPTURED AND ABANDONED PROPERTY.—Fourth. Of all claims for the proceeds of captured or abandoned property, as provided by the act of March 12, 1863, chapter 120, entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrec-

tionary districts within the United States," or by the act of July 2, 1864, chapter 225, being an act in addition thereto; *provided*, that the remedy given in cases of seizure under the said acts, by preferring claim in the Court of Claims, shall be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property in virtue or under color of said acts from suits at common law, or any other mode of redress whatever, before any court other than the said Court of Claims; *provided, also*, that the jurisdiction of the Court of Claims shall not extend to any claim against the United States growing out of the destruction or appropriation of or damage to property by the army or navy engaged in the suppression of the rebellion.

PRIVATE CLAIMS IN CONGRESS, WHEN TRANSMITTED TO COURT OF CLAIMS.—*Sec.* 1060. All petitions and bills praying or providing for the satisfaction of private claims against the government, founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, shall, unless otherwise ordered by resolution of the house in which they are introduced, be transmitted by the Secretary of the Senate or the Clerk of the House of Representatives, with all the accompanying documents, to the Court of Claims.

JUDGMENTS FOR SET-OFF OR COUNTER-CLAIM, HOW ENFORCED.—*Sec.* 1061. Upon the trial of any cause in which any set-off, counter-claim, claim for damages or other demand is set up on the part of the government against any person making claim against the government in said court, the court shall hear and determine such claim or demand both for and against the government and claimant; and if upon the whole case it finds that the claimant is indebted to the government, it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law. Any transcript of such judgment, filed in the clerk's office of any district or circuit court, shall be entered upon the records thereof, and shall thereby become and be a judgment of such court, and be enforced as other judgments in such courts are enforced.

DECREE ON ACCOUNTS OF PAYMASTERS, ETC.—*Sec.* 1060. Whenever the Court of Claims ascertains the facts of any loss by any paymas-

ter, quartermaster, commissary of subsistence, or other disbursing officer, in the cases hereinbefore provided, to have been without fault or negligence on the part of such officer, it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the treasury shall allow to such officer the amount so decreed, as a credit in the settlement of his accounts.

CLAIMS REFERRED BY DEPARTMENTS.—*Sec.* 1063. Whenever any claim is made against any executive department, involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege or exemption is claimed or denied under the Constitution of the United States, the head of such department may cause such claim, with all the vouchers, papers, proofs and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; and the Secretary of the Treasury may, upon the certificate of any auditor or comptroller of the Treasury, direct any account, matter or claim, of the character, amount or class described in this section, to be transmitted, with all the vouchers, papers, documents and proofs pertaining thereto, to the said court, for trial and adjudication; *provided*, that no case shall be referred by any head of a department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant.

PROCEDURE IN CASES TRANSMITTED BY DEPARTMENTS.—*Sec.* 1064. All cases transmitted by the head of any department, or upon the certificate of any auditor or comptroller, according to the provisions of the preceding section, shall be proceeded in as other cases pending in the Court of Claims, and shall in all respects be subject to the same rules and regulations.

JUDGMENTS IN CASES TRANSMITTED BY DEPARTMENTS, HOW PAID. —*Sec.* 1065. The amount of any final judgment or decree rendered in favor of the claimant, in any case transmitted to the Court of Claims under the two preceding sections, shall be paid out of any

specific appropriation applicable to the case, if any such there be; and where no such appropriation exists, the judgment or decree shall be paid in the same manner as other judgments of the said court.

CLAIMS GROWING OUT OF TREATIES NOT COGNIZABLE THEREIN.—*Sec.* 1066. The jurisdiction of the said court shall not extend to any claim against the government not pending therein on December one, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes.

CLAIMS NOT TO BE PROSECUTED BY PARTIES HAVING SUITS IN OTHER COURTS RESPECTING SAME AGAINST PERSONS ACTING FOR THE UNITED STATES.—*Sec.* 1067. No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

ALIENS.—*Sec.* 1068. Aliens, who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction.

LIMITATION.—*Sec.* 1069. Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues; *provided*, that the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

RULES OF PRACTICE; CONTEMPTS.—*Sec.* 1070. The said court shall have power to establish rules for its government and for the regulation of practice therein, and it may punish for contempt in the manner prescribed by the common law, may appoint commissioners, and may exercise such powers as are necessary to carry into effect the powers granted to it by law.

OATHS AND ACKNOWLEDGMENTS.—*Sec.* 1071. The judges and clerks of said court may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of the same.

PETITION, WHAT TO SET FORTH.—*Sec.* 1072. The claimant shall, in all cases, fully set forth in his petition the claim, the action thereon in Congress or by any of the departments, if such action has been had; what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of said claim, or of any part thereof or interest therein, has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; that the claimant, and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, and that he believes the facts as stated in the said petition to be true. And the said petition shall be verified by the affidavit of the claimant, his agent or attorney.

PETITION TO BE DISMISSED IF ISSUE FOUND AGAINST CLAIMANT AS TO ALLEGIANCE, ETC.—*Sec.* 1073. The said allegations as to true allegiance and voluntary aiding, abetting or giving encouragement to rebellion against the government may be traversed by the government, and if on the trial such issues shall be decided against the claimant, his petition shall be dismissed.

BURDEN OF PROOF AND EVIDENCE AS TO LOYALTY.—*Sec.* 1074. Whenever it is material in any claim to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the claimant asserting the loyalty of any such person to the United States during such rebellion shall be required to prove affirmatively that such person did, during said rebellion, consistently adhere to

the United States, and did give no aid or comfort to persons engaged in said rebellion; and the voluntary residence of any such person in any place where, at any time during such residence, the rebel force or organization held sway, shall be *prima facie* evidence that such person did give aid and comfort to said rebellion and to the persons engaged therein.

COMMISSIONERS TO TAKE TESTIMONY.—*Sec.* 1075. The Court of Claims shall have power to appoint commissioners to take testimony to be used in the investigation of claims which come before it; to prescribe the fees which they shall receive for their services, and to issue commissions for the taking of such testimony, whether taken at the instance of the claimant or of the United States.

POWER TO CALL UPON DEPARTMENTS FOR INFORMATION.—*Sec.* 1076. The said court shall have power to call upon any of the departments for any information or papers it may deem necessary, and shall have the use of all recorded and printed reports made by the committees of each house of Congress, when deemed necessary in the prosecution of its business. But the head of any department may refuse and omit to comply with any call for information or papers when, in his opinion, such compliance would be injurious to the public interest.

WHEN TESTIMONY NOT TO BE TAKEN.—*Sec.* 1077. When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not be the duty of the court to authorize the taking of any testimony therein.

WITNESSES NOT EXCLUDED ON ACCOUNT OF COLOR.—*Sec.* 1078. No witness shall be excluded in any suit in the Court of Claims on account of color.

PARTIES AND PERSONS INTERESTED EXCLUDED AS WITNESSES.—*Sec.* 1079. No claimant, nor any person from or through whom any such claimant derives his alleged title, claim or right against the United States, nor any person interested in any such title, claim or right, shall be a competent witness in the Court of Claims in supporting the same, and no testimony given by such claimant or person shall be used except as provided in the next section.

EXAMINATION OF CLAIMANT.—*Sec.* 1080. The court may, at the instance of the attorney or solicitor appearing in behalf of the United States, make an order in any case pending therein, direct-

ing any claimant in such case to appear, upon reasonable notice, before any commissioner of the court, and be examined on oath touching any or all matters pertaining to said claim. Such examination shall be reduced to writing by the said commissioner, and be returned to and filed in the court, and may, at the discretion of the attorney or solicitor of the United States appearing in the case, be read and used as evidence on the trial thereof. And if any claimant, after such order is made, and due and reasonable notice thereof is given to him, fails to appear, or refuses to testify or answer fully as to all matters within his knowledge material to the issue, the court may, in its discretion, order that the said cause shall not be brought forward for trial until he shall have fully complied with the order of the court in the premises.

TESTIMONY TAKEN WHERE DEPONENT RESIDES.—*Sec.* 1081. The testimony in cases pending before the Court of Claims shall be taken in the county where the witness resides, when the same can be conveniently done.

WITNESSES, HOW COMPELLED TO ATTEND BEFORE COMMISSIONERS.—*Sec.* 1082. The Court of Claims may issue subpœnas to require the attendance of witnesses in order to be examined before any person commissioned to take testimony therein, and such subpœnas shall have the same force as if issued from a district court, and compliance therewith shall be compelled under such rules and orders as the court shall establish.

CROSS-EXAMINATION.—*Sec.* 1083. In taking testimony to be used in support of any claim, opportunity shall be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as said court shall prescribe; and like opportunity shall be afforded the claimant, in cases where testimony is taken on behalf of the United States, under like regulations.

WITNESSES, HOW SWORN.—*Sec.* 1084. The commissioner taking testimony to be used in the Court of Claims shall administer an oath or affirmation to the witnesses brought before him for examination.

FEES OF COMMISSIONER, BY WHOM PAID.—*Sec.* 1085. When testimony is taken for the claimant, the fees of the commissioner before whom it is taken, and the cost of the commission and notice, shall be paid by such claimant; and when it is taken at the instance of the government, such fees, together with all postage incurred by the

Assistant Attorney-General, shall be paid out of the contingent fund provided for the Court of Claims, or other appropriation made by Congress for that purpose.

CLAIMS FORFEITED FOR FRAUD.—*Sec.* 1086. Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment or allowance of any claim or any part of any claim against the United States, shall ipso facto forfeit the same to the government; and it shall be the duty of the Court of Claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the government, and that the claimant be forever barred from prosecuting the same.

NEW TRIAL ON MOTION OF CLAIMANT.—*Sec.* 1087. When judgment is rendered against any claimant, the court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

NEW TRIAL ON MOTION OF UNITED STATES.—*Sec.* 1088. The Court of Claims, at any time while any claim is pending before it or on appeal from it, or within two years next after the final disposition of such claim, may on motion on behalf of the United States grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law.

PAYMENT OF JUDGMENTS.—*Sec.* 1089. In all cases of final judgments by the Court of Claims, or on appeal by the Supreme Court where the same are affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the Court of Claims, and signed by the Chief Justice, or in his absence by the presiding judge of said court.

INTEREST.—*Sec.* 1090. In cases where the judgment appealed from is in favor of the claimant, and the same is affirmed by the Supreme Court, interest thereon at the rate of five per centum

shall be allowed from the date of its presentation to the Secretary of the Treasury for payment as aforesaid; but no interest shall be allowed subsequent to the affirmance, unless presented for payment to the Secretary of the Treasury as aforesaid.

INTEREST ON CLAIMS.—*Sec.* 1091. No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.

PAYMENT OF JUDGMENT A FULL DISCHARGE, ETC.—*Sec.* 1092. The payment of the amount due by any judgment of the Court of Claims and of any interest thereon allowed by law, as hereinbefore provided, shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy.

FINAL JUDGMENTS A BAR.—*Sec.* 1093. Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy.

ATTORNEY-GENERAL TO TRANSMIT PETITION IN CERTAIN CASES TO DEPARTMENTS, ETC.—*Sec.* 188. In all suits brought against the United States in the Court of Claims founded upon any contract, agreement or transaction with any department, or any bureau, officer or agent of a department, or where the matter or thing on which the claim is based has been passed upon and decided by any department, bureau or officer authorized to adjust it, the Attorney-General shall transmit to such department, bureau or officer a printed copy of the petition filed by the claimant, with a request that the department, bureau or officer shall furnish to the Attorney-General all facts, circumstances and evidence touching the claim in the possession or knowledge of the department, bureau or officer.

Such department, bureau or officer shall, without delay and within a reasonable time, furnish the Attorney-General with a full statement, in writing, of all such facts, information and proofs.

The statement shall contain a reference to or description of all such official documents or papers, if any, as may furnish proof of facts referred to in it, or may be necessary and proper for the defence of the United States against the claim, mentioning the department, office or place where the same is kept or may be procured. If the claim has been passed upon and decided by the

department, bureau or officer, the statement shall succinctly state the reasons and principles upon which such decision was based. In all cases where such decision was founded upon any act of Congress, or upon any section or clause of such act, the same shall be cited specifically; and if any previous interpretation or construction has been given to such act, section or clause by the department, bureau or officer, the same shall be set forth succinctly in the statement, and a copy of the opinion filed, if any, shall be annexed to it. Where any decision in the case has been based upon any regulation of a department, or where such regulation has, in the opinion of the department, bureau or officer transmitting such statement, any bearing upon the claim in suit, the same shall be distinctly quoted at length in the statement.

But where more than one case, or a class of cases, is pending, the defence to which rests upon the same facts, circumstances and proofs, the department, bureau or officer shall only be required to certify and transmit one statement of the same, and such statement shall be held to apply to all such cases as if made out, certified and transmitted in each case respectively.

APPEALS TO SUPREME COURT.—*Sec.* 707. An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court, as provided in section 1086.

APPEALS; TIME AND MANNER OF TAKING.—*Sec.* 708. All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct.

ASSIGNMENT OF CLAIMS AGAINST UNITED STATES BEFORE ISSUE OF WARRANT VOID.—*Sec.* 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authority for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance

of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

Such transfers, assignments and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same.

CONTRACTS OF SECRETARIES OF WAR, NAVY AND INTERIOR TO BE IN WRITING, SIGNED, ETC.—*Sec.* 3744. It shall be the duty of the Secretary of War, of the Secretary of the Navy and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the government, or by their officers under them, appointed to make such contracts, to be reduced to writing and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the return office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return. (See §§ 512–515.)

THREE JUDGES TO CONSTITUTE A QUORUM, ETC.—That any three judges of the Court of Claims shall constitute a quorum; *provided*, that the concurrence of three judges shall be necessary to the decision of any case.[1]

COSTS OF RECORDS IN THE SUPREME COURT AND COURT OF CLAIMS, HOW TO BE PAID FOR.—There shall be taxed against the losing party in each and every cause pending in the Supreme Court of the United States, or in the Court of Claims of the United States, the cost of printing the record in such case, which shall be collected, except when the judgment is against the United States, by the clerks of said courts respectively, and paid into the treasury

[1] Act of June 23, 1874, 18 Stat. at L., ch. 468, 252.

of the United States; but this shall only apply to records printed after the first of October next.[1]

CLAIMS ON CHINESE INDEMNITY FUND FOR LOSS, ETC., ON BARK CALDEA REFERRED TO THE COURT OF CLAIMS.—Any person or persons, or body corporate, holding and making any claim upon the balance of the fund usually designated and known as "the Chinese indemnity fund," under the control of the Department of State of the United States and now unappropriated, for loss sustained by the plunder and destruction, in the year 1854, of the bark Caldera, and property on board of said vessel, may at any time within twelve months after the passage of this act commence proceedings in the United States Court of Claims against the United States, in the same manner as other suits are brought, pursuant to and in virtue of the statutes of the United States and the rules of said court; and the said Court of Claims shall have full jurisdiction to hear and determine such claim or demand, according to the principles of justice and international law.

DOCUMENTS WHICH MAY BE USED, AND PROCEEDINGS IN THIS CASE.—At the hearing or on the trial of any suit so commenced, either party, the plaintiff or defendant, shall have the right to use before the court any testimony or documents which may be relevant to and competent upon the issues joined between the parties; and the proceedings, trial, decision and judgment of the said court shall be had in the same manner as in all other cases before the said Court of Claims, and have the same effect; and either party, plaintiff or defendant, may appeal from the decision or judgment of the said Court of Claims to the Supreme Court of the United States in the same manner as now provided for in other cases; *provided, however*, that if any final judgment be found in favor of a claimant or plaintiff, the same can only be paid and satisfied out of the balance of said Chinese indemnity fund; and if said judgment shall be in favor of the defendant, then such claimants will be forever barred in law and equity from hereafter making any claim upon or against said fund.[2]

CLAIMS OF NEW MEXICO MOUNTED VOLUNTEERS FOR LOSS OF HORSES, ETC., REFERRED TO THE COURT OF CLAIMS.—The Court of Claims can take jurisdiction of and adjudge the claims of

[1] Act of March 3, 1877, 18 Stat. at L., ch. 105, 344.

[2] Act of June 19, 1878, 20 Stat. at L., ch. 319, 171.

officers and privates of the New Mexico Mounted Volunteers in the service of the United States during the war of the rebellion, on account of losses of horses and equipments, although the same shall not be presented within six years from the time they accrued; *provided*, that no such claim can be considered unless the petition setting forth the same be filed within one year from the passage of this act.[1]

The act of March 3, 1883, provides as follows:

"*Sec.* 1. That whenever a claim or matter is pending before any committee of the Senate or House of Representatives, or before either house of Congress, which involves the investigation and determination of facts, the committee or house may cause the same, with the vouchers, papers, proofs and documents pertaining thereto, to be transmitted to the Court of Claims of the United States, and the same shall there be proceeded in under such rules as the court may adopt. When the facts shall have been found, the court shall not enter judgment thereon, but shall report the same to the committee or to the house by which the case was transmitted for its consideration.

"*Sec.* 2. That when a claim or matter is pending in any of the executive departments which may involve controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, proofs and documents pertaining thereto, to said court, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report its findings and opinions to the department by which it was transmitted, for its guidance and action.

"*Sec.* 3. The jurisdiction of said court shall not extend to or include any claim against the United States growing out of the destruction or damage to property by the army or navy during the war for the suppression of the rebellion, or for the use and occupation of real estate by any part of the military or naval forces of the United States in the operations of said forces during the said war at the seat of war; nor shall the said court have jurisdiction of any claim against the United States which is now barred by virtue of the provisions of any law of the United States.

"*Sec.* 4. In any case of a claim for supplies or stores taken by or

[1] Act of March 1, 1879, 20 Stat. at L., ch. 115, 324.

furnished to any part of the military or naval forces of the United States for their use during the late war for the suppression of the rebellion, the petition shall aver that the person who furnished such supplies or stores, or from whom such supplies or stores were taken, did not give any aid or comfort to said rebellion, but was throughout that war loyal to the government of the United States, and the fact of such loyalty shall be a jurisdictional fact; and unless the said court shall, on a preliminary inquiry, find that the person who furnished such supplies or stores, or from whom the same were taken as aforesaid, was loyal to the government of the United States throughout said war, the court shall not have jurisdiction of such cause, and the same shall, without further proceedings, be dismissed.

"*Sec.* 5. That the Attorney-General, or his assistants under his direction, shall appear for the defence and protection of the interests of the United States in all cases which may be transmitted to the Court of Claims under this act, with the same power to interpose counter-claims, offsets, defences for fraud practiced or attempted to be practiced by claimants, and other defences, in like manner as he is now required to defend the United States in said court.

"*Sec.* 6. That in the trial of such cases no person shall be excluded as a witness because he or she is a party to or interested in the same.

"*Sec.* 7. That reports of the Court of Claims to Congress under this act, if not finally acted upon during the session at which they are reported, shall be continued from session to session and from Congress to Congress until the same shall be finally acted upon."

It will be seen that departmental officers may, under this act, rid themselves of all controversies of law or fact in any matter which comes before them by having the secretary refer the same to the Court of Claims, where it will be judicially investigated and determined. After receiving a report from the court, the department will have no responsibility but to be guided by the decision thus obtained and to act thereon.[1]

[1] In the article referred to in a previous note, Judge Richardson observes: "The organic act of 1855 gave to the court jurisdiction to hear and determine 'all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract express or implied with the government of the United States, and all claims which may be referred to it by either house of Congress.'

"That jurisdiction continues to the present time, except as it is affected

§ 401. **Jurisdiction limited; no jurisdiction in case of torts.**—It will be observed that the jurisdiction of the Court of Claims is by a statute of limitations inserted in the act of March 3, 1863, by which it was provided that 'every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues;' saving the right upon claims then already accrued to file the petition within three years after the passage of the act, and also the rights of certain persons under disability.

"The consequence of this limitation is that claimants now go to Congress with their petitions for redress in matters of claims to which this exclusion from the Court of Claims applies, and in some special cases Congress has waived the statute in their behalf.

"The same act of 1863 gave to the court jurisdiction of 'all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatever on the part of the government against any person making claims against the government in said court.' Under this provision the United States have obtained judgment against individuals in several cases, and in certain railroad cases they have recovered more than a million of dollars.

"By the act of May 9, 1866, the jurisdiction was extended 'to hear and determine the claim of any paymaster, quartermaster, commissary of subsistence or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of losses by capture or otherwise, while in the line of his duty, of government funds, vouchers, records and papers in his charge, and for which such officer was and is held responsible;' with authority to enter a decree for his relief, to be certified to and allowed by the accounting officers of the treasury as a credit whenever the court 'ascertained the facts of any such loss to have been without fault or neglect on the part of any such officer.'

"The jurisdiction of the court was further extended by the act of June 25, 1868, so as to authorize the head of any executive department, or the Secretary of the Treasury, on the certificate of any auditor or comptroller, to transmit to the court for hearing and adjudication any claim belonging to one of the classes of which the court might take jurisdiction, on the voluntary action of the claimant, 'whenever the same involves disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount in controversy in the particular case; or where any authority, right, privilege or exemption is claimed or denied under the Constitution of the United States.' It has been decided by the Supreme Court that the six years' limitation imposed by the statute in other cases does not apply in this court to cases thus referred, where the claimant had presented his claim to the department within six years after it had accrued.

"Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts have the privilege of prosecuting claims against the United States in the Court of Claims, whereof the court, by reason of their subject-matter and character, might take jurisdiction. It has been judicially determined by decisions already made that under this provision the right to sue in this court is accorded to citizens of Prussia, Hanover, Bavaria, Switzerland, the Netherlands, the Hanseatic Provinces, the free city of Hamburg, Spain, Belgium, Italy and Great Britain, and it no doubt belongs to the citizens of other countries.

limited to certain matters. Beyond these it cannot take cognizance of cases. It has no jurisdiction of suits founded upon torts. Thus,

"The jurisdiction of the court is restricted as to certain claims for or in respect to which the claimants have pending in other courts suits against persons who at the time the causes of action occurred were acting, or professing to act, under the authority of the United States, and certain claims growing out of treaties.

"These provisions confer the general, continuing and permanent jurisdiction of the court. They may be found, with their incidental regulations and details, in chapter 21 of the Revised Statutes of the United States. But Congress has, from time to time, given to the court jurisdiction, for a limited period, in particular classes of cases, and has, by special acts, transmitted many single claims to the court for adjudication.

"By the act of March 12, 1863, entitled 'An act to provide for the collection of abandoned and captured property, and for the prevention of frauds in insurrectionary districts within the United States,' the Secretary of the Treasury was authorized to appoint agents to receive and collect all abandoned or captured property in any state or territory, or any portion of any state or territory, of the United States designated as insurrectionary against the lawful government of the United States by proclamation of the President of July 1, 1862. The property collected was required to be appropriated to public use, or sold and the proceeds paid into the treasury of the United States.

"The third section of the act provided that 'any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims, and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof.'

"It was decided by the Supreme Court that, in accordance with the President's proclamation, the suppression of the rebellion must be recognized as having taken effect on the 2d of April, 1866, in the states of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana and Arkansas, and on the 20th of August, 1866, 'throughout the whole of the United States.' The right to file petitions under this act therefore expired on the 20th of August, 1868.

"The Supreme Court decided, in 1871, that the President's proclamation of December 25, 1868, granting 'unconditionally and without reservation to all and every person who directly or indirectly participated in the late insurrection or rebellion a full pardon and amnesty for the offence of treason against the United States, etc., with restoration of all rights, privileges and immunities under the Constitution and laws which have been made in pursuance thereof,' enabled claimants under this act to recover in the Court of Claims without proof that they never gave aid or comfort to the rebellion. This decision having been made after the time for bringing actions allowed by the act, it came too late for those who had previously been deterred from presenting their petitions by reason of their participation in the rebellion.

"Under this act the court has disposed of claims amounting to more than thirty million dollars, according to the petitions. But the judgments recovered have not probably exceeded a third part of the amount claimed; and the fund arising from the captured and abandoned property, which was covered into the treasury by special direction of Congress, is not exhausted and cannot be much affect-

it cannot take cognizance of a cause based upon the wrongful act of an officer of the United States, as for a claim arising from false

ed by the few cases which remain undisposed of.

"By the act of June 16, 1880, Congress gave to this court jurisdiction of certain claims against the District of Columbia, limiting parties to six months from the passage of the act in which to file their petitions. Under this authority 342 cases have been instituted, most of which the claimants have not yet brought to trial.

"In 1873, by special act, Congress granted jurisdiction to the Court of Claims to hear and determine the case of the city of Carondelet, brought to recover against the United States the value of a tract of land of about 1700 acres, formerly a military reservation, and near which had grown up the settlement, village and city of Carondelet, subsequently merged into the city of Saint Louis. The court held that the title was in the United States, and its decision was affirmed by the Supreme Court on appeal.

"Several cases have been referred to the court by Congress, in which the owners of vessels claimed damages on account of collisions with vessels of the navy of the United States, occurring, as alleged, by reason of the fault and negligence of the naval officers in command of the latter.

"In 1873, and previously, there arose a controversy between the United States and the Pacific Railroad companies as to the right of the former to withhold payment for freight and transportation for the government until those companies had reimbursed the United States for interest paid on the bonds issued for the aid and benefit of the companies, which were made payable in thirty years; the companies claiming that the interest paid by the United States was not to be reimbursed until the maturity of the bonds. There were some other questions also involved.

"A section in the appropriation act of March 3, 1873, provided that the Secretary of the Treasury should withhold all payments to said companies, but giving the companies the right to bring suit in the Court of Claims therefor. Actions were brought and were prosecuted and defended with great ability; the Attorney-General himself appearing for the government, and Mr. Sidney Bartlett, of Boston, and Mr. E. W. Stoughton, of New York, for the claimants. In the first or leading case, judgment was rendered for the claimants, and on appeal to the Supreme Court, the rulings of the Court of Claims were affirmed. In a subsequent case some changes were made by the Supreme Court in the method of computing the amount allowed. Judgments were finally recovered in the different cases, amounting in the aggregate to nearly two million dollars. The amount, however, was not the most material part of the controversy, the real question being whether or not the defendants had a right to retain the amount as a set-off to the interest paid.

"So in 1874 and 1875 Congress prohibited the payment of any money from the public treasury for the transportation of any property or troops of the United States, or any officers of the army travelling under military orders, over any railroad which, in whole or in part, was constructed by the aid of a grant of public land on condition that such railroad should be a public highway for the use of the government free of toll or other charge, or upon any other conditions for the use of such road for such transportation, reserving the right to the companies to bring suit in the Court of Claims, and recovering for the same if found entitled thereto by virtue of the laws in force prior to the passage of the act of prohibition, and waiving the Statute of Limitation. In pursuance of this provision suits were brought, and the rights of the United States and of the railroad companies under the land-grant acts were adjudicated and settled, and Congress was relieved from further trouble in the matter.

"For many years there was pending in Congress a claim of the trustees of Albert G. Sloo for carrying the

imprisonment by one of its officers, or for damages sustained by the

mail between New York and Chagres and New Orleans and Chagres, in addition to the regular service required under a contract made in 1847. 'Application was persistently made,' say the Supreme Court, 'to Congress for an equitable allowance, but for some reason or other the subject was always postponed or delayed, until finally, on the 14th of July, 1870, Congress passed an act 'referring the case to the Court of Claims.' The case involved the rights of the parties and the liabilities of the government, growing out of correspondence with the Postmaster-General at the time the service was performed, and the amount in controversy was more than a million dollars. The case was tried before four judges of the Court of Claims, and they were equally divided upon the question of the liability of the United States. A *pro forma* judgment was entered for the defendants, and the case was taken to the Supreme Court on appeal. A majority of that court held the United States liable, and a mandate was issued accordingly and judgment entered thereon for the claimants, for $1,031,000, three judges of the Supreme Court dissenting.

"By the act of June 19, 1878, Congress authorized any persons or body corporate, holding or making any claim upon the balance of the fund usually designated and known as 'the Chinese indemnity fund,' under the control of the Department of State of the United States, for loss sustained by the plunder and destruction, in the year 1854, of the bark Caldera, and property on board of said vessel, at any time within twelve months after the passage of the act to commence proceedings in the Court of Claims, and conferred jurisdiction on the court to hear and determine such claims 'according to principles of justice and international law.' Suits were brought and thoroughly and exhaustively tried by able counsel. The Court of Claims gave judgment for the claimants, two of the five judges dissenting. On appeal, the judges of the Supreme Court were equally divided in opinion, and the judgment was affirmed for that reason.

"In this connection it may be mentioned that another case of an earlier date, La Peyre *v.* The United States, even more singularly divided the two courts. The question involved was the novel one, whether a proclamation of the executive takes effect from the day of its date or from the time of its promulgation. In the Court of Claims the point was argued before four judges, a reargument was ordered, and the court then stood equally divided, judgment *pro forma* being given against the claimant. In the Supreme Court the point was again argued, a reargument was likewise ordered, and the court then stood five for reversal and four for affirmance, with one of the majority merely concurring in the judgment.

"On the 3d of March, 1881, Congress passed an act which authorized the Court of Claims to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the Choctaw Nation and to render judgment thereon, with power to review the entire question of differences *de novo*, without being estopped by any action had or award made by the Senate of the United States, in pursuance of the treaty of 1855. These 'questions of difference' grew out of treaties made in 1820, 1825, 1830, 1855 and 1856. They had been in controversy in Congress and the departments for many years, and involved a claim of more than fifteen millions of dollars. Suit has been instituted, and although the evidence is not yet all put in, the printed record of the case already covers more than thirteen hundred pages, and will probably be extended to two thousand pages or more.

"Numerous other important cases, specially referred to the court, might be cited, but a sufficient number have been mentioned to convey a correct idea of its jurisdiction, and to show the magnitude and intricacies of its business, as well as the relief which is afforded to Congress by removing

bombardment of a town;[1] or for the wrongful and forcible possession of land taken by the United States;[2] or for damages arising from a collision with a vessel of the United States.[3] But under the peculiar circumstances of the case, where the government in an emergency took private property for public use, it was held, there was an implied promise to compensate the owner therefor, and that the Court of Claims had jurisdiction of a claim based thereon.[4]

§ 402. **No jurisdiction in equity cases.**—No provision is made by the section under consideration for the exercise of any equitable jurisdiction by the Court of Claims, and hence it cannot take cognizance of causes involving an investigation of equitable rights set up by claimants against the United States.[5] In Bonner *v.* United States, cited in the last note, Mr. Justice Davis observes: "Congress did not think proper to part with the consideration of such questions, but wisely reserved to itself the power to dispose of them. Immunity from suit is an incident of sovereignty; but the government of the United States in a spirit of great liberality waived that immunity in favor of those persons who had claims against it which were founded upon any law of Congress or regulation of an executive department, or upon any contract with it, express or implied, and gave the Court of Claims the power to hear and determine claims of this nature."

§ 403. **Its jurisdiction of claims arising under the revenue laws.**—No provision is made by the section of the statute conferring jurisdiction on the Court of Claims to take cognizance of claims arising under the revenue laws. If there is a claim growing out of the administration of these laws, the statute points out the remedy, which must be pursued by those aggrieved thereby. But the Court

such controversies from the halls of legislation."

[1] Gibbons *v.* United States, 8 Wall. 269; s. c., 2 Ct. Cl. 421; Spicer *v.* United States, 1 Ct. Cl. 316; Perrin *v.* United States, 12 Wall. 315.

[2] Langford *v.* United States, 101 U. S. 341.

[3] Dennis *v.* United States, 2 Ct. Cl. 210. See also United States *v.* Bostwick, 94 U. S. 53; s. c., 12 Ct. Cl. 67.

[4] United States *v.* Russell, 13 Wall. 623.

[5] Bonner *v.* United States, 9 Wall. 156; s. c., 1 Ct. Cl. 125. But see also Titson *v.* United States, 10 U. S. 43; Harvey's Case, 13 Ct. Cl. 322. Nor has this court jurisdiction of a case against the government to recover a military land warrant: United States *v.* Alire, 6 Wall. 573. Nor of a case for merely nominal damages arising for a breach of contract: Grant *v.* United States, 7 Wall. 331. The only judgment which the Court of Claims can render is one for money found due to the petitioner from the government: United States *v.* Alire, 6 Wall. 573; s. c., 1 Ct. Cl. 233.

of Claims has no jurisdiction of such cases.[1] The government has entrusted the determination of such matters to certain specified officers, and a final hearing therein to other tribunals.[2]

Thus, where a manufacturer has paid the tax required by the internal revenue laws on the goods manufactured, which laws provide for a drawback in case of the exportation of the goods, the manufacturer cannot prosecute an action therefor in the Court of Claims, as another remedy is provided by said laws.[3] So an importer cannot maintain an action in said court to recover a duty upon imported goods, although the duty was illegal.[4] Nor can a distiller prosecute an action therein to recover a claim on account of leakage.[5]

But this court may take cognizance of claims growing out of the administration of the internal revenue laws, where they are based upon a law of Congress, or upon any regulation of the executive department, or upon a contract, express or implied, with the government of the United States, and especially where there is no redress elsewhere.[6]

Thus, the Court of Claims may entertain a petition by an assessor of internal revenue to recover money deposited with a collector to secure a compromise of a prosecution against the former, if the compromise fails and the money is covered into the treasury of the United States.[7] So it has jurisdiction of a claim of an informer to recover his share of a forfeiture under the revenue laws;[8] and especially if the money arising from the forfeiture has been covered into the treasury of the United States.[9] So a manufacturer of articles required to be stamped under the revenue laws may recover in this court commission on stamps allowed by said laws.[10] And an importer may recover money deposited by him with a collector of

[1] Nichols *v.* United States, 7 Wall. 122.

[2] Broughton *v.* United States, 12 Ct. Cl. 330. If there is discretionary power given to an officer to remit penalties under the revenue laws, the Court of Claims can have no jurisdiction of a claim against the government based thereon: Dorsheimer *v.* United States, 7 Wall. 167.

[3] Portland Co. *v.* United States, 5 Ct. Cl. 441.

[4] Nichols *v.* United States, 7 Wall. 122; De Celis *v.* United States, 13 Ct. Cl. 117; Doherty *v.* United States, 6 Ct. Cl. 90.

[5] Turner *v.* United States, 9 Ct. Cl. 307.

[6] Brown *v.* United States, 6 Ct. Cl. 171.

[7] Broughton *v.* United States, 12 Ct. Cl. 330.

[8] Shelton *v.* United States, 8 Ct. Cl. 487.

[9] Bradley *v.* United States, 12 Ct. Cl. 578.

[10] Dailey *v.* United States, 7 Ct. Cl. 383.

duties in excess of the duties on goods received by him.[1] But if the amount of claim for a drawback is required by the revenue laws to be ascertained by a specified officer, and this has not been done, or if the claim is for a share of a forfeiture under said laws, and on a proper submission the Secretary of the Treasury has decided against it, the Court of Claims will not take cognizance of the same.[2]

§ 404. **Claims founded upon any law of Congress or any regulation of an executive department.**—The statute provides for the jurisdiction of the Court of Claims where the claim is founded upon any act of Congress. If such a claim should be rejected by an executive department, it could still be prosecuted in this court.[3] Thus, an officer of the government may prosecute a claim in this court for a salary allowed him by an act of Congress.[4] So where, by a law of Congress, the United States had assumed the payment of certain bonds of the state of Texas, it was held that an action thereon could be maintained by the payee in this court, although they had been lost or stolen and without endorsement had been paid to the holder.[5]

A "regulation of an executive department" may, under the statute of the United States conferring that power, have the force and effect of law; and it is such a regulation that is meant by the language of the statute. It relates to regulations on which the department has a right to act, and made by such department.[6]

§ 405. **Jurisdiction in case of claim upon contract.**—The court has jurisdiction of all claims founded upon express or implied contracts with the government. Few controversies have arisen under this ground of jurisdiction where the contract was express, but many cases have occurred in relation to implied contracts. In a case of a lease of property by the United States, where the lessor claimed damages for the negligent use or want of reasonable care in the use of the property by the United States, it was held

[1] Broulatour *v.* United States, 7 Ct. Cl 555.

[2] Ramsey *v.* United States, 14 Ct. Cl. 367; Campbell *v.* United States, 12 Ct. Cl. 470.

[3] Alire *v.* United States, 1 Ct. Cl. 233; Bogert *v.* United States, 3 Ct. Cl. 18.

[4] Moore *v.* United States, 4 Ct. Cl. 139.

[5] Morrell *v.* United States, 7 Ct. Cl. 421.

[6] Harvey *v.* United States, 3 Ct. Cl. 38. But an order assigning duties to a clerk in a department was held not to be a "regulation of an executive department:" Harvey *v.* U. S., 3 Ct. Cl. 38.

that this court could take cognizance of the claim.[1] So if the United States refuse to accept goods according to an express contract with a party, by which the latter suffers damages, a claim for the same may be maintained in this court.[2] And where the United States took possession of real property under a contract of purchase made with an officer of the government who had no authority to make it, but which purchase was ratified by an act of Congress, this was held to make the contract binding from the time of ratification, but not to make the United States liable for the rent of the property from the time of purchase to the time of ratification.[3]

§ 406. **Jurisdiction in case of implied contract.**—Controversies have arisen as to the jurisdiction of this court on claims based upon alleged implied contracts with the government. The claim, as we have already shown, must be for money, and to constitute an implied contract for the payment of money there must necessarily be some consideration therefor; and an implied contract cannot in any case arise out of the acts of an agent who has no authority to make an express contract.[4] If the claim is for money received by the United States, it must also appear that they are charged with a duty to pay it over to the claimant; and in case of money paid by mistake, it must appear that the claimant had a lawful right to it when it was received by the United States.[5] And money erroneously exacted of a claimant, where no other specific remedy is provided, may be recovered in this court, as such a claim is based upon an implied contract to repay the same.[6]

§ 407. **Instances where the court took cognizance of cases based upon implied contracts.**—Where the United States had entered upon land and used the same, without any express contract therefor, the owner was allowed to prosecute in this court, on the implied contract to pay for the use of the same.[7] So where the United States chartered a vessel of the owner and then appropriated it to

[1] United States *v.* Bostwick, 94 U. S. 53; s. c., 12 Ct. Cl. 67.

[2] Gibbons *v.* United States, 8 Wall. 269; s. c., 2 Ct. Cl. 421.

[3] Carpenter *v.* United States, 17 Wall. 489; s. c., 6 Ct. Cl. 18. But see Moore *v.* United States, 10 Ct. Cl. 375, where the owner of land was allowed to maintain an action in the Court of Claims to recover the rent and income thereof.

[4] Pitcher *v.* United States, 1 Ct. Cl. 7. But the United States may be liable if they ratify and receive the benefits of such a contract: De Celis *v.* U. S., 13 Ct. Cl. 117.

[5] Knote *v.* United States, 95 U. S. 149; s. c., 10 Ct. Cl. 397.

[6] Schlesinger *v.* United States, 1 Ct. Cl. 16. But see Nichols *v.* U. S., 7 Wall. 122; De Celis *v.* U. S., 13 Ct. Cl. 117.

[7] Johnson *v.* United States, 4 Ct. Cl. 248.

their own use, under the provisions of the charter party, the owner was allowed to prosecute a claim for its value in this court.[1] So where the United States received goods through a fraud of their agent, the owner was allowed to prosecute an action in this court therefor.[2] So if a contract made by one person for goods to be delivered by another person to the United States is void, still the person who delivers the goods to the latter may recover upon an implied contract to pay for the same.[3] So if an officer of the United States, under an urgent and immediate necessity in the discharge of his duty, takes private property for public use (except in the cases mentioned in the statute, where property was taken by the army or navy, engaged in the suppression of the rebellion), there is an implied promise to pay for the same, and the owner may maintain an action therefor in this court.[4] So a person who has rendered salvage service in saving property of the United States may claim compensation therefor, and this court will take cognizance of the claim as one based upon an implied contract.[5] So a person who had paid a fine pursuant to an unlawful sentence of a military commission, organized in a state contrary to law, at a time when the courts were open, was allowed to prosecute his claim in this court for the fine so paid.[6] And the party who claims for an excess in the payment of a special tax, which has been allowed by the Commissioner of Internal Revenue, may maintain an action in this court therefor.[7]

§ 408. **Instances where the court would not entertain jurisdiction on a claim of implied contract.**—This court refused to entertain a claim for a recovery of property confiscated by the army during the rebellion, although the claimant had been pardoned.[8] So where the United States took possession of lands under a treaty, and as trustee for the Indians, it was held that a claimant of the same could not prosecute in this court to recover compensation therefor as owner of the same.[9] So a person who attends as a witness before either

[1] Bogert *v.* United States, 2 Ct. Cl. 159; Bogert *v.* United States, 3 Ct. Cl. 18.

[2] United States *v.* State Bank, 96 U. S. 30.

[3] Heathfield *v.* United States, 8 Ct. Cl. 213.

[4] United States *v.* Russell, 13 Wall. 623; s. c., 5 Ct. Cl. 121; Grant *v.* United States, 1 Ct. Cl. 41.

[5] Bryan *v.* United States, 6 Ct. Cl. 128.

[6] Devlin *v.* United States, 12 Ct. Cl. 266.

[7] United States *v.* Kaufman, 96 U. S. 567; s. c., 11 Ct. Cl. 659.

[8] Knote *v.* United States, 95 U. S. 149; s. c., 10 Ct. Cl. 397.

[9] Langford *v.* United States, 12 Ct. Cl. 338.

house of Congress cannot maintain an action against the United States for his fees.[1] And where an officer of the government took forcible possession of land for public use, it was held that he was thereby guilty of a tort, and that as no implied contract could arise therefrom, this court could have no jurisdiction of a claim based thereon.[2]

§ 409. **Actions for infringement of patents.**—It will be manifest from the statutory provisions conferring jurisdiction upon the Court of Claims, and the authorities heretofore referred to construing those provisions, that no action could be maintained in that court to recover damages against the United States for the infringement of a patent.[3] Where the warden of a penitentiary used a machine that infringed a patent, and paid the proceeds arising from the sale of articles made therewith to the United States, it was held that the patentee could not prosecute a claim to recover the profits of such manufacture and sale in this court. But if the United States, through their duly constituted agents, agree to pay a patentee or his assignee for the use of a patented invention a certain amount of royalty, then the patentee or assignee of such patentee, as the case may be, can recover on the contract the amount agreed to be paid, and the Court of Claims would take cognizance of the case.[4] And if a patentee should offer his invention to the United States, and they through their duly constituted officers and agents should act upon the offer and adopt and use the invention, the former could maintain an action to recover thereon what the invention was really worth, in the absence of any express contract in reference to the amount to be paid therefor.[5]

§ 410. **Jurisdiction in case of claims referred to it by Congress.**—The act provides for the jurisdiction of the Court of Claims of all claims referred to it by either house of Congress. This has been held to embrace the case of a claim referred to it by a resolution of Congress; and in such a case it is further held that the court is subject to all the restrictions prescribed by the resolution.[6]

[1] Lilley *v.* United States, 14 Ct. Cl. 539.

[2] Langford *v.* United States, 101 U. S. 341.

[3] Fletcher *v.* United States, 11 Ct. Cl. 748.

[4] United States *v.* Burnes, 12 Wall. 246; s. c., 4 Ct. Cl. 113.

[5] McKeever *v.* United States, 14 Ct. Cl. 396.

[6] Atocha *v.* United States, 6 Ct. Cl. 69; s. c., 17 Wall. 439; De Groot *v.* United States, 5 Wall. 419; Roberts *v.* United States, 6 Ct. Cl. 84; s. c., 92 U. S. 41; Tillison *v.* United States, 11 Ct. Cl. 758; Harvey *v.* United

§ 411. **Provision relating to set-offs, counter-claims, etc.**—Whenever the court may entertain jurisdiction of an action against the United States for a recovery under the provisions of the first subdivision of the section under consideration, the second subdivision provides that the court may also take cognizance of all set-offs, counter-claims, claims for damages or other demands on the part of the United States against the person making the claim against them. It is not necessary that the set-off or demand against the claimant be liquidated; the statute is broad enough to cover all claims against him or those whom he represents; and the court may hear and determine demands of the government of every description against the claimant, and set off the amount found due on such demands and claims of the government upon the hearing and determination of the cause.[1] Where the United States had recovered a judgment against M., and took an assignment of a judgment of the latter against B. in satisfaction of the former, it was held that they might set off the latter judgment in a suit brought by B. in the Court of Claims to recover an award made by Congress in his favor, although he had assigned the award to another, if the set-off was acquired before notice of the assignment.[2]

And the same doctrine applies in case of claim for an internal revenue tax.[3] And if an action is brought on a judgment rendered against the United States for property, the latter may set off the amount of the taxes due them on the property for which the judgment was rendered.[4] But if the United States fail to claim an off-set or demand of any kind which they might have set up on a claim made before the court, and judgment is entered in favor of the claimant for the value of property, the Secretary of the Treasury of the United States cannot afterwards deduct from the judgment the tax due on the property.[5]

§ 412. **A set-off, counter-claim or other defence must be pleaded.**—In order for the government to avail itself of the second sub-

States, 12 Ct. Cl. 141; Same *v.* Same, 13 Ct. Cl. 322.

[1] Allen *v.* United States, 17 Wall. 207.

[2] Macauley *v.* United States, 11 Ct. Cl. 693.

[3] Roman *v.* United States, 11 Ct. Cl. 761.

[4] Bonnafon *v.* United States, 14 Ct. Cl. 484.

[5] United States *v.* O'Grady, 22 Wall. 641; s. c., 8 Ct. Cl. 451. See also in special cases where other provisions are made, Jones *v.* United States, 4 Ct. Cl. 197; Roman *v.* United States, 11 Ct. Cl. 761; also McKnight *v.* United States, 98 U. S. 179.

division of the section under consideration relating to set-offs, counter-claims, etc., it is necessary that these matters of defence be specially pleaded. The judgments of this court, where no appeal is taken, are absolutely conclusive of the rights of the parties, unless a new trial is granted as provided by the statutes.[1]

§ 413. **Jurisdiction of claims of disbursing officers.**—The third subdivision of the section under consideration provides for the jurisdiction of the Court of Claims in case of a claim for relief from responsibility of any disbursing officer of the United States on account of capture or otherwise, while in the line of his duty, of government funds, vouchers, records or papers in his charge, etc. This more particularly embraces paymasters, quartermasters and commissaries of subsistence.

It has been held, under this provision, that the statute applied to cases of loss occurring before its adoption, as well as to those occurring subsequently thereto.[2] The officers mentioned in the statute can have no relief under this provision, nor the court have any jurisdiction of such a case, unless there is an existing liability at the time of the application. If the liability once existing has been discharged, there is no authority for the court to act.[3]

Under this provision a disbursing officer may obtain relief in this court from responsibility on account of a loss of government funds by robbery.[4] But he is not entitled to relief from responsibility for any loss occurring through the embezzlement of a clerk in his employment; nor for the loss of money, unless the money was at the time of the loss in his possession and under his control.[5]

§ 414. **Claims for the proceeds of captured or abandoned property.**—Subdivision 4 of the section giving jurisdiction to the Court of Claims confers power on that court to hear and determine all claims for the proceeds of captured or abandoned property, as provided by the acts of March 12, 1863, and July 2, 1864. And such subdivision excludes every other mode of redress against the United States or their agents, in the cases referred to. But the court has no jurisdiction of claims against the United States grow-

[1] United States *v.* O'Grady, 13 Wall. 664. As to new trials, see §§ 1087, 1088, of the Rev. Stat.

[2] Glenn *v.* United States, 4 Ct. Cl. 501.

[3] Hall *v.* United States, 9 Ct. Cl. 270.

[4] United States *v.* Clark, 96 U. S. 37; s. c., 11 Ct. Cl. 698.

[5] Hall *v.* United States, 9 Ct. Cl. 270.

ing out of the destruction or appropriation of, or damage to, property by the army or navy, engaged in the suppression of the rebellion.

Under this subdivision and the provisions of the acts referred to therein, it was held that no claim could be maintained for property which had been used, or was intended to be used, in carrying on war against the United States, and that the court could not take jurisdiction of a claim against the United States for property taken or destroyed by the army or navy of the United States while engaged in suppressing the rebellion. The only remedy in such a case must be through the executive or legislative departments of the government.[1]

Under the provisions of these statutes it has further been held that no action can be maintained to recover the proceeds of captured or abandoned property unless the property on which the claim is based was captured or seized, and sold, pursuant to the acts relating to captured and abandoned property, and the proceeds of the sale thereof were paid into the treasury of the United States, or went into the hands of some officer with the approval of the Treasurer, and the claimant was the owner of the property and entitled to the proceeds thereof. These facts should be clearly stated in the pleading, and must be established by sufficient proof on the trial to maintain the claim.[2] If the proceeds came into the hands of some military officer who used them in paying the expenses of ordinary military operations, or for other purposes authorized by law, and these disbursements have been allowed by the accounting officers of the treasury, this has been held equivalent to payment into the treasury.[3]

§ 415. **Presumptions in relation to the proceeds of captured property.**—Where the proceeds of the property sold were traced to the hands of an officer whose duty it was to transmit them to the

[1] Slawson *v.* United States, 6 Ct. Cl. 370; s. c., 16 Wall. 310; United States *v.* Kimball, 13 Wall. 636; Gearing *v.* United States, 3 Ct. Cl. 165.

[2] Spencer *v.* United States, 8 Ct. Cl. 288; s. c., 91 United States 577; United States *v.* Ross, 92 U. S. 281; s. c., 10 Ct. Cl. 424; Sharp *v.* United States, 12 Ct. Cl. 638; Smith *v.* United States, 14 Ct. Cl. 189; United States *v.* Anderson, 9 Wall. 56; Bond *v.* United States, 2 Ct. Cl. 529. Though the property was captured on land and condemned as prize, the claimant may prosecute an action in this court for the proceeds: 99 U. S. 372; Cook *v.* United States, 9 Ct. Cl. 288; Winchester *v.* United States, 14 Ct. Cl. 13; s. c., 99 U. S. 372.

[3] Fleeker *v.* United States, 14 Ct. Cl. 252; Hudnal *v.* United States, 3 Ct. Cl. 291; Block *v.* United States, 7 Ct. Cl. 406.

Secretary of the Treasury, and a fund was shown to be in the treasury which might have been derived in whole or in part from the money thus transmitted, it was held that there was a presumption that the money was in the treasury.[1] But evidence merely that an officer of the government received the money derived from a sale, without any evidence that it was paid into the treasury or lawfully expended for the use of the government, affords no presumption of its proper disposition, and would be insufficient to base a claim for the proceeds. And proof that the property came into the possession of an employe of a treasury agent would raise no presumption that it came into the treasury.

§ 416. **The claimant must always have been a loyal citizen.**—Section 1072 of the Revised Statutes provides that the petition of the claimant should set forth "that the claimant, and where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the government of the United States, and whether a citizen or not, has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said government, and that he believes the facts stated in the petition to be true. And the said petition shall be verified by the affidavit of the claimant, his agent or attorney." Under this statute it was held that if the property of a loyal and a disloyal person was intermingled and partly destroyed by fire, and the remaining property captured, under the provisions of the act relating to captured and abandoned property the disloyal person cannot waive his interest in the property thus captured, so as to enable the loyal party to recover the proceeds of the whole property.[2]

§ 417. **Claim for property destroyed, appropriated or injured by the army or navy.**—The subdivision under consideration excepts from the jurisdiction of the Court of Claims "any claim against the United States growing out of the destruction or appropriation

[1] Jenkins *v.* United States, 8 Ct. Cl. 464; Crussell *v.* United States, 4 Id. 553; s. c., 14 Wall. 1; United States *v.* Pugh, 99 U. S. 265; Henry *v.* United States, 6 Ct. Cl. 389; Silvey *v.* United States, 4 Id. 490; s. c., 7 Id. 178.

[2] O'Keefe *v.* United States, 5 Ct. Cl. 674; s. c., 11 Wall. 178. But see Mezeix *v.* United States, 6 Ct. Cl. 232, where a loyal citizen was allowed to recover money taken from him, on account of disloyalty, by a military officer. If the property was captured before July 17, 1862, no action can be maintained: Moore *v.* United States, 10 Ct. Cl. 375. If the property was sold after July 17, 1862, and before March 12, 1863, and the proceeds paid into the treasury, an action may be maintained therefor: United States *v.* Pugh, 99 U. S. 265.

of, or damage to, property by the army or navy, engaged in the suppression of the rebellion."[1]

The term "appropriation" used in the statute includes all taking and use of property, either real or personal, by the army or navy, engaged in suppressing the rebellion, not authorized by any contract with the government. The use may be temporary or permanent, but if the taking and use is not obtained by a lawful contract with the government, the taking and use is an "appropriation" within the meaning of the statute, and the Court of Claims can take no jurisdiction of a claim based thereon.[2] The same rule was held to apply even where an officer of the army took the property in an insurrectionary state, and promised to pay therefor and gave vouchers for it.[3] So a claim arising from the impressment of a vessel by a military officer engaged in suppressing the rebellion cannot be prosecuted in the Court of Claims.[4]

But if an army officer took possession of premises under a valid contract, then the owner can maintain an action on the contract; and if damages are sustained by alterations made in the premises thus taken, the owner may have a remedy therefor in this court.[5] And where a vessel was chartered to the United States by the owner, and a military officer sunk her for military purposes, it was held that this court had jurisdiction of a claim based thereon for the value of the vessel.[6] But where an officer made a contract with the owner for the use or purchase of property during the rebellion, and for military purposes, but he had no authority so to do, it was held that the owner could not maintain an action therefor in this court.[7] Where the claimant's money was taken by the army, and thus came into the possession of the United States, it was held that this was not an appropriation by the army, and that an action therefor in this court should be sustained.[8]

[1] Rev. Stat. § 1059, sub. 4; Corbett *v.* United States, 1 Ct. Cl. 139; Waters *v.* United States, 4 Id. 389.

[2] Filor *v.* United States, 9 Wall. 45. See also Bishop *v.* United States, 4 Ct. Cl. 448; Pugh *v.* United States, 13 Wall. 633; s. c., 5 Ct. Cl. 113; Smith *v.* United States, 14 Ct. Cl. 189; Raines *v.* United States, 11 Id. 648.

[3] Patterson *v.* United States, 6 Ct. Cl. 60.

[4] United States *v.* Kimbal, 13 Wall. 636; s. c., 5 Ct. Cl. 252.

[5] Provine *v.* United States, 5 Ct. Cl. 455; United States *v.* Russell, 13 Wall. 623; s. c., 5 Ct. Cl. 121.

[6] Bogert *v.* United States, 2 Ct. Cl. 159; Same *v.* Same, 3 Id. 18. See also Waters *v.* United States, 4 Id. 389.

[7] Slawson *v.* United States, 4 Ct. Cl. 87; Same *v.* Same, 6 Id. 370; s. c., 16 Wall. 310; Lindsley *v.* United States, 4 Ct. Cl. 359; Filor *v.* United States, 9 Wall. 45.

[8] Pennsylvania Co. *v.* United States, 7 Ct. Cl. 401.

§ 418. **Private claims in Congress must be transmitted to the Court of Claims.**—As one of the objects to be obtained by the constitution of the Court of Claims was to relieve Congress of the importunities of claimants against the government, and of the labor and vexation necessarily connected with the numerous petitions for relief of those who had private claims against the government, it was wisely provided that "all petitions and bills praying or providing for the satisfaction of private claims against the government, founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, shall, unless otherwise ordered by the house in which they are introduced, be transmitted by the Secretary of the Senate or the Clerk of the House of Representatives, with all the accompanying documents, to the Court of Claims."[1]

This provision is most salutary, as it removes from the legislative department and the arena of politics matters that properly belong to the judiciary department of the government, where justice is more likely to be administered both to the claimant and the government.

§ 419. **In case of judgments for set-off or counter-claim; how enforced.**—We have noticed that the statute conferring jurisdiction on this court provides also that the court shall have jurisdiction of "all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government of the United States against any person making claim against the government in said court." It was wisely provided, further, that the court should hear and determine the claim against the government and the claim for the government, and render such judgment for either party as may be just. In the former case, if no appeal is taken provision is made for the satisfaction of the judgment by the Secretary of the Treasury, as we shall hereafter notice;[2] but in the latter case it is provided that the transcript of such judgment may be filed in the clerk's office of any district or circuit court; that it shall be entered upon the records thereof, and thereby become a judgment of such court, and may be enforced as other judgments of such court. The statute provides:

[1] Rev. Stat. § 1060.

[2] Rev. Stat. § 1089. Where there is no definite evidence as to the amount of a counter-claim, if it appears to be in excess of the claim it may be used to defeat it, but judgment will not in such a case be entered against the claimant: Shrewsbury *v.* United States, 13 Ct. Cl. 183.

"Upon the trial of any cause in which set-off, counter-claim, claim for damages or other demand is set up on the part of the government against any person making claim against the government in said court, the court shall hear and determine such claim or demand both for and against the government and claimant; and if upon the whole case it finds that the claimant is indebted to the government, it shall render judgment to that effect, and such judgment shall be final, with the right of appeal as in other cases provided by law. Any transcript of such judgment, filed in the clerk's office of any district or circuit court, shall be entered upon the records thereof, and shall thereby become and be a judgment of such court and be enforced as other judgments in such courts are enforced." [1]

The provision therein contained, providing for the filing of a transcript in the office of the clerk of any district or circuit court, and thereby making it a judgment of such court, is one for the benefit of the government only. The constitution of this court was for the benefit of claimants and a matter of grace on the part of the government, and the mode of satisfaction pointed out by the statute in case the claimant recovers judgment is the only mode of satisfaction which the claimant has.

§ 420. **No jury trials in the Court of Claims.**—The great spirit of liberality on the part of the government which led to the constitution of the Court of Claims, with jurisdiction to hear and determine certain claims against the government, did not extend to the giving of a right of trial by jury in such cases. The issues of law as well as of fact must be tried by the court, and the provisions of the statute, although not providing for the trial by jury, have been held to be constitutional.[2]

§ 421. **Decrees in favor of paymasters and other accounting officers.**—We have noticed the jurisdiction of this court in case of claims of paymasters and other accounting officers of the government on account of losses of government funds, etc., by capture or otherwise while in the line of their duty, and for which they are held responsible.[3] In case such a claim is established in this court another section provides how the decree must be satisfied. It provides as follows: "Whenever the Court of Claims ascertains the

[1] See Rev. Stat. § 1061.
[2] M'Elrath *v.* U. S., 12 Ct. Cl. 312.
[3] Id.

facts of any loss by any paymaster, quartermaster, commissary of subsistence or other disbursing officer, in cases hereinbefore provided, to have been without fault or negligence on the part of such officer, it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the treasury shall allow to such officer the amount so decreed, as a credit in the settlement of his accounts."[1]

The right to recover in such a case will depend upon the officer's freedom from fault in connection with the loss. The facts of the particular case must be considered in the light of surrounding circumstances. What acts would be prudent and proper under the circumstances and necessities of a case might in other cases, owing to other facts and surrounding circumstances, be imprudent and negligent; and what would excuse a party for acts or conduct at one time and place may not do so under another state of facts. Great care and caution may be required at one time when it may not be required at others.

Negligence is the want of the ordinary care which a prudent man would exercise under the circumstances, and always involves the consideration of all the circumstances of the particular case. But ordinary care in one case may be gross negligence in another.[2] It was held, where a disbursing officer put money in a safe at his quarters, and a robber entered during his temporary absence and broke open the safe and took the money, that he was entitled to relief.[3]

So if money deposited by him in a safe is captured by the enemy he is entitled to relief in the Court of Claims.[4] And if he leaves his safe or money-box in a fort, as other disbursing officers have been accustomed to, and it is stolen, he is entitled to an allowance therefor.[5] So if he puts his desk containing government money and vouchers on board a transportation train, and it is captured by the enemy, he is entitled to credit for the money and vouchers.[6] But

[1] Rev. Stat. § 1062.

[2] Glenn *v.* United States, 4 Ct. Cl. 501; Malone *v.* United States, 5 Ct. Cl. 486.

[3] United States *v.* Clark, 96 U. S. 37; s. c., 11 Ct. Cl. 698. So where a disbursing officer under like circumstances left money in his safe which was stolen by his clerk, who had a key to the safe, he was held to be entitled to an allowance therefor: Howell *v.* United States, 7 Ct. Cl. 512.

[4] Christian *v.* United States, 7 Ct. Cl. 431. Or if captured by a raiding party: Prime *v.* United States, 3 Ct. Cl. 209.

[5] Glenn *v.* United States, 4 Ct. Cl. 501.

[6] Murphy *v.* United States, 3 Ct. Cl. 212. So, if it is lost while carrying it in the breast-pocket of his coat in the way such officers generally carry money: Whittlesey *v.* United States, 5 Ct. Cl. 452.

where a paymaster sent a package of $2658 by an orderly detailed for service at his office, to a treasury depository in Boston, to be deposited there, and it was stolen by the orderly, but the loss was not discovered for several days thereafter, in a suit in the Court of Claims by the administrator of the deceased paymaster asking for relief from responsibility on account of the loss, it was held that the paymaster was at fault and negligent in entrusting so large a sum of money with the orderly, instead of depositing it himself or sending it by his clerk, and therefore that although the orderly had been prosecuted and convicted of the theft, and efforts to secure the stolen money had proved unavailing, the petitioner was not entitled to the relief he prayed.[1]

§ 422. **When the head of an executive department may cause claims to be transmitted to the Court of Claims.**—The statute provides: "Whenever any claim is made against any executive department involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases or furnish a precedent for the future action of any executive department in the adjustment of a class of cases without regard to the amount involved in the particular case, or where any authority, privilege or exemption is claimed or denied under the Constitution of the United States, the head of such department may cause such claim, with all the vouchers, papers, proofs and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; and the Secretary of the Treasury may, upon the certificate of any auditor or comptroller of the treasury, direct any account, matter or claim of the character, amount or class described in this section to be transmitted, with all the vouchers, papers, documents and proofs pertaining thereto, to said court for trial and adjudication; *provided*, that no case shall be referred by any head of a department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant."[2]

[1] Holman *v.* United States, 11 Ct. Cl. 642. But see Clark's Case, 11 Ct. Cl. 698; s. c., 96 U. S. 37; Hall's Case, 9 Ct. Cl. 270.

[2] Rev. Stat. § 1063.

Although claims may be presented to any executive department of the government, as where they grow out of contracts with such department, still the Court of Claims cannot make a rule requiring such claims to be presented to such department before suing on them in that court.[1] A claim may be referred to the Court of Claims at any time before the payment thereof, and even after it has been previously referred to the accounting officers and allowed by the auditor and comptroller.[2] And if a claim for rent is made to an executive department, it may be referred to this court; and a claim may be referred although it involves a controversy between several claimants.[3]

But where the Secretary of War transmitted a claim to the Court of Claims, and the statement showed that the government occupied certain premises and that certain rent was due therefor, but that two parties claimed the same, and only one of the parties appeared in the court and prosecuted his claim, the government making no defence, it was held that the party appearing could take no default, as it was necessary for him to show a *prima facie* right to recover, although it was not necessary to negative the conflicting claim of the adverse party.[4]

§ 423. **Procedure in cases transmitted by departments.**—In all cases where claims are transmitted by the head of any department or upon the certificate of any auditor or comptroller, according to the provisions of the section last referred to, they must be proceeded in as in other cases pending in the Court of Claims, and are in all cases subject to the same rules and regulations.[5] The claimant should in such cases file his petition in this court, setting forth the facts on which he bases his claim, and the court, as in other cases, will decide the controversy both upon the law and the facts. If there are contesting claimants and one fails to appear in this court, a citation may issue for him to appear; but if he does not appear, and the government does not controvert the claim, still the claimant must establish his claim by legal proof.[6] But the claimant and the

[1] Clyde *v.* United States, 13 Wall. 38; s. c., 5 Ct. Cl. 134.

[2] Delaware Steamboat *v.* United States, 5 Ct. Cl. 55; Winnissimmet Co. *v.* United States, 12 Ct. Cl. 319.

[3] Bright *v.* United States, 6 Ct. Cl. 118.

[4] Bright's Case, 8 Ct. Cl. 326.

[5] Rev. Stat. § 1064.

[6] Bright *v.* United States, 6 Ct. Cl. 118; Same *v.* Same, 8 Ct. Cl. 326. The allowance of a claim by an accounting officer will not make out a *prima facie* case in favor of the petitioner in the Court of Claims: McKnight *v.* United States, 13 Ct. Cl 292; s. c., 98 U. S. 179.

head of a department may agree upon a statement of facts, and submit only a question of law to this court.[1]

The amount of any final judgment or decree rendered in any case transmitted to this court from the head of any department must be paid out of any specific appropriations applicable to the case, if any such there be; and if no such appropriation exists, then the judgment or decree must be paid in the same manner as other judgments of the court.[2]

§ 424. **Claims pending in other courts cannot be prosecuted in the Court of Claims.**—The statute prohibits any person from filing or prosecuting in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act mediately or immediately under the authority of the United States.[3]

§ 425. **Aliens may prosecute claims in certain cases.**—An alien who is a citizen or subject of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts has the privilege of prosecuting claims against the United States in the Court of Claims, if such court by reason of its subject-matter and character may take jurisdiction.[4] The right to prosecute in such cases depends upon the reciprocal rights of our citizens in the courts of the government to which the alien owes allegiance; but such alien can only prosecute such claims as a citizen could prosecute. This right of aliens will be accorded even though the foreign government may reserve the right to deny a remedy to our citizens in its courts against it, in certain sporadic cases.[5]

The following mentioned governments accord to citizens of the United States the right to prosecute claims in their courts against their governments, as fully and substantially as they are allowed to prosecute against the government of the United States; to wit, Great Britain, France, Belgium, Italy, Prussia, Spain and Switzer-

[1] Amoskeag *v.* United States, 6 Ct. Cl. 99; Broulatour *v.* United States, 7 Ct. Cl. 555.
[2] Rev. Stat. § 1065.
[3] Rev. Stat. § 1067.
[4] Rev. Stat. § 1068.
[5] United States *v.* O'Keefe, 11 Wall. 178; Carlisle *v.* United States, 16 Wall. 147.

land. Hence an alien owing allegiance to either of these governments may maintain an action in the Court of Claims, in any of those cases where the court would have jurisdiction if a citizen was the claimant.[1]

The section under consideration was adopted July 27, 1867, previous to which time there was no limitation of the jurisdiction of the court on the ground of alienage. This section then was one of limitation and restriction. Therefore where a suit was brought by an alien, after the organization of the court and the conferring of jurisdiction upon it, but before the adoption of the section now under consideration, the jurisdiction of the court could not be affected by the fact of alienage, or the rights and privileges of American citizens in the courts of the government to which the alien owed allegiance.[2]

§ 426. **Limitation of actions in the Court of Claims.**—The statute limits the time of presenting claims to this court for adjudication as follows: "Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the secretary of the Senate or clerk of the House of Representatives as provided by law, within six years after the claim first accrues; *provided*, that the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued entitled to the claim, shall not be barred if the petition be filed in the court or transmitted as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of such disabilities operate cumulatively."[3]

[1] United States *v.* O'Keefe, 11 Wall. 178; s. c., 5 Ct. Cl. 674; Carlisle *v.* United States, 16 Wall. 147; Rothschilds *v.* United States, 6 Ct. Cl. 204; Dauphin *v.* United States, 6 Ct. Cl. 221; De Give *v.* United States, 7 Ct. Cl. 517; Fichera *v.* United States, 9 Ct. Cl. 254; Brown *v.* United States, 5 Ct. Cl. 571; Noling *v.* United States, 6 Ct. Cl. 269; Lobsiger *v.* United States, 5 Ct. Cl. 687.

[2] Schafer *v.* United States, 4 Ct. Cl. 529; Wagner *v.* United States, 5 Ct. Cl. 637; Bulwinkle *v.* United States, 4 Ct. Cl. 395; Mentz *v.* United States, 4 Ct. Cl. 471. The right to sue is given under this section to an alien, although a citizen of the United States may be required to give security for costs: Brown *v.* United States, 5 Ct. Cl. 571.

[3] Rev. Stat. § 1069; McKnight *v.* United States, 98 U. S. 179; s. c., 13 Ct. Cl. 292; Cross *v.* United States, 4 Ct. Cl. 271; Bell *v.* United States, 9 Ct. Cl. 302; s. c., 20 Wall. 179; Campbell *v.* United States, 13 Ct. Cl. 108.

The provisions of this section have been held not to apply to suits pending at the time of its adoption,[1] nor to claims for the proceeds of captured or abandoned property, as in the latter case the claim was barred under the provisions of the statute relating thereto, unless the petition therefor was filed within two years after the 20th day of August, 1868.[2]

It is not essential that the limitation should be pleaded as a defence, but the court is bound to take notice of the fact that the period limited by law has expired, if it appears on the face of the petition or by the evidence in the case.[3]

§ 427. **When the time commences to run.**—Under the provisions of this Statute of Limitation, where the claim was for the surplus of the proceeds of land sold for a direct tax, it was held that the cause of action accrued upon the refusal of the Secretary of the Treasury to pay the money.[4] But where the claim is for money received by the United States and paid into the treasury, the action must be brought within six years after it is thus paid in.[5] If the claim arises on a contract for the sale of goods, the suit must be brought within six years from the stipulated time of payment.[6] If the claimant merely seeks to have a sum of money, lost by him as a disbursing officer, allowed to him on the settlement of his accounts with the government, the statute does not begin to run until the accounting officers of the treasury refuse to allow the sum lost as a valid credit in the settlement of the accounts.[7]

If a collector of customs pays money into the treasury, in compliance with a demand of the Treasury Department, which he is entitled to retain as a compensation for his services, the statute

[1] Parlin *v.* United States, 1 Ct. Cl. 174.

[2] United States *v.* Anderson, 9 Wall. 56; s. c., 4 Ct. Cl. 467; Grossmeyer *v.* United States, 4 Ct. Cl. 1; Hamner *v.* United States, 13 Ct. Cl. 7; Haycroft *v.* United States, 22 Wall. 81; s. c., 10 Ct. Cl. 95; Schafer *v.* United States, 4 Ct. Cl. 529; Persons *v.* United States, 10 Ct. Cl. 502. A petition for the proceeds of captured or abandoned property could not be entertained before the suppression of the rebellion: Tibbets *v.* United States, 1 Ct. Cl. 196; s. c., 2 Ct. Cl. 582.

[3] Kendal *v.* United States, 14 Ct. Cl. 122.

[4] Taylor *v.* United States, 14 Ct. Cl. 339.

[5] Clark *v.* United States, 99 U. S. 493.

[6] Bartelle *v.* United States, 7 Ct. Cl. 297.

[7] United States *v.* Clark, 96 U. S. 37; s. c., 11 Ct. Cl. 698; Smith *v.* United States, 14 Ct. Cl. 114. If claims are presented for settlement within six years, to the proper head of an executive department, they are not barred if more than six years transpire before they are referred by such department to the Court of Claims: United States *v.* Lippitt, 100 U. S. 663.

begins to run from the time of the payment.[1] If the claimant dies before the claim becomes due, the statute will not begin to run until an administrator is appointed.[2] But if the statute begins to run in the lifetime of the claimant, its operation will not be suspended by his death.[3] If the claim is properly made within the time prescribed, the petition may be amended, although more than six years have elapsed since the claim accrued; and this is especially the case where the amendment only increases the *ad damnum* laid in the original petition.[4]

§ 428. **The Court of Claims may establish rules for its government and practice.**—The Court of Claims has authority to establish rules for its government and for the regulation of practice therein, and it has authority to punish for contempt in the manner prescribed by the common law. It may appoint commissioners and exercise such powers as are necessary to carry into effect the powers given by law.[5] For rules established by this court, see *post.* The court will appoint a special commissioner where there are complicated accounts or complicated facts to be passed upon, to whom they will be referred to state the accounts, and report his finding on the facts.[6] So, if the claimant does not in his petition set forth the items of his account, the court may refer the case to a special commissioner, to state an account at the expense of the claimant.[7] If there are several claimants seeking to recover the proceeds of a common fund held by the United States, the court may properly refer the case to a commissioner to marshal the assets and charge it with the proper losses, so that justice may be done.[8]

If a cause is referred to a special commissioner to state an account, notice should be given to the parties to appear before him for that purpose; and if either party is not satisfied with his state-

[1] Lawson *v.* United States, 14 Ct. Cl. 332. See also Bachelor *v.* United States, 8 Ct. Cl. 235; Ellsworth *v.* United States, 14 Ct. Cl. 382. No exception can be engrafted on the statute, however reasonable and just it may appear: Cross *v.* United States, 4 Ct. Cl. 271; and payment of part of the debt will not take the case out of the operation of the statute: United States *v.* Wilder, 13 Wall. 254.

[2] Fulenweider *v.* United States, 9 Ct. Cl. 403.

[3] Sierra *v.* United States, 9 Ct. Cl. 224.

[4] Griffin *v.* United States, 13 Ct. Cl. 257; Devlin *v.* United States, 12 Ct. Cl. 266.

[5] Rev. Stat. § 1070.

[6] United States *v.* Raymond, 92 U. S. 651; Lawrence *v.* United States, 6 Ct. Cl. 79.

[7] Jones *v.* United States, 4 Ct. Cl. 197.

[8] Persons *v.* United States, 10 Ct. Cl. 502; Crowell *v.* United States, 6 Ct. Cl. 23.

ment of the account, or the finding of facts, he should except to the report.[1]

The judges and clerks of the court are authorized to administer oaths and affirmations, take acknowledgments of instruments in writing and give certificates of the same.[2]

§ 429. **The petition; what it should contain.**—The petition must in all cases set forth the claim and any action of Congress or by any of the departments thereon, if any action has been had. It should also set forth what persons are the owners of the claim or interested in it, and when and upon what consideration they became so interested therein. It should also state that no assignment or transfer of the claim, or any part thereof or interest therein, has been made, except as stated in the petition, and that the claimant is justly entitled to the amount therein claimed from the United States after deducting all just credits and off-sets. And it was formerly required that it should further state that claimant, and where the claim has been assigned, that the original and prior owner thereof, if a citizen, has at all times borne true allegiance to the government of the United States, and, whether a citizen or not, has not voluntarily aided, abetted or given encouragement to rebellion against the government of the United States, and that he believes the facts as stated in the petition to be true. But since the recent decision relating to the effect of the proclamation of amnesty and general pardon, the court does not require an allegation of loyalty in the petition.[3] The petition must be verified by the plaintiff or his agent or attorney.[4]

The petition should set forth the facts on which the claimant bases his claim with precision and without ambiguity; and if there is uncertainty in the language used, it will be construed most strongly against the claimant.[5] It need not set forth the evidence which is to be used to prove the facts, but it should state the facts upon which the claim rests.[6] If the petition is to recover money illegally

[1] Jones *v.* United States, 4 Ct. Cl. 197; Bright *v.* United States, 12 Ct. Cl. 646.

[2] Rev. Stat. § 1071.

[3] United States *v.* Insurance Companies, 22 Wall. 99; Carlisle *v.* United States, 16 Wall. 147.

[4] Rev. Stat. § 1072. For form of petitions see *post*, Form No. 266.

[5] Merchants' Exchange Co. *v.* United States, 1 Ct. Cl. 332; Guttman *v.* United States, 6 Ct. Cl. 111.

[6] Brown *v.* United States, 1 Ct. Cl. 377; Baird *v.* United States, 5 Ct. Cl. 348; s. c., 8 Ct. Cl. 13; Monk *v.* United States, 12 Ct. Cl. 293; Morgan *v.* United States, 14 Ct. Cl. 442; Noble *v.* United States, Dev. C. C. 134.

exacted by some agent or officer of the government as duties, it should aver that a protest was made as required by law;[1] and if the claim is founded upon an act of Congress, the act should be referred to in the petition. If the petition on its face shows that the claim first accrued more than six years before it was filed, it should set forth at least one of the legal disabilities mentioned in the statute as a bar to the operation of the statute, and further show that it was filed within three years after such disability was removed.[2]

The petition should further state the amount for which the claimant demands judgment or the relief which he claims. And as we have observed, it was formerly required that the plaintiff, whether a citizen or an alien, should state that he has not in any way voluntarily aided, abetted or given encouragement to rebellion against the government of the United States;[3] or if so, that he has been legally and fully pardoned for such participation in the rebellion by the President of the United States.[4] For form of petition see *post*, No. 268.

§ 430. **Parties.**—A corporation may be a claimant; and where a corporation was created in an insurrectionary state during the rebellion, with no purpose hostile to the United States, nor in conflict with the Constitution, it was held that such corporation might prosecute an action in the Court of Claims under the "captured and abandoned property act."[5] So a *feme covert* may prosecute a claim in her own name where her husband refuses to join her, if the laws of the state where she has her domicile allow her to sue under such circumstances.[6] So a principal may sue on a contract made by an agent in his own name and without disclosing his principal.[7] And if a guardian is appointed in one state and an executrix in another, the former may file a petition for his ward if he is appointed in the state where the ward has his domicile.[8]

If there are two parties interested in a contract on which the claim against the government is based, one may prosecute the claim although the other is disqualified by disloyalty.[9] But in such a

[1] Schlesinger *v.* United States, 1 Ct. Cl. 16; Nicoll *v.* United States, 1 Ct. Cl. 70.

[2] Kendal *v.* United States, 14 Ct. Cl. 122; Same *v.* Same, 14 Ct. Cl. 374.

[3] Patterson *v.* United States, 6 Ct. Cl. 60; Hill *v.* United States, 8 Ct. Cl. 470.

[4] Pargond *v.* United States, 13 Wall. 156; s. c., 4 Ct. Cl. 337.

[5] United States *v.* Insurance Companies, 22 Wall. 99.

[6] Stanton *v.* United States, 4 Ct. Cl. 456. See also Meriwether *v.* United States, 13 Ct. Cl. 259.

[7] Ramsdell *v.* United States, 2 Ct. Cl. 508.

[8] Stanton *v.* United States, 4 Ct. Cl. 456.

[9] United States *v.* Burns, 12 Wall.

case the claimant must show the extent of his interest, and can only recover to that extent.[1] And where the claimants were partners, it was held that the disloyalty of one would defeat the action, if there was no means of determining the individual interest of each in the claim made.[2] As a general rule all persons who have a joint interest in the claim should join in the petition; but if several parties have separate interests in the same, they cannot properly join in one petition. Thus, where two separate firms have separate claims they cannot unite and file a petition therefor.[3]

§ 431. **Choses in action.**—It seems that the general principle of the common law in reference to assignments of choses in action are followed in this court. If the claim assigned is a chose in action, suit may be prosecuted in the name of the assignor for the benefit of the assignee, if the assignor is connected with the case, which may be shown by his verification of the petition or by proof of the transfer.[4] And if an assignment is made for the benefit of creditors, the assignee may prosecute the suit in the name of the assignor.[5]

§ 432. **Pleading, practice and procedure.**—The general rules of common law relating to pleading are required to be observed in the Court of Claims, although the proceedings will not be regulated by the exact rules of special pleading. The substance of matters will be regarded rather than forms and technicalities.[6] If a petition is not verified, a motion may be made to dismiss it;[7] and if the petition does not show a right to recover, or that the court has jurisdiction of the cause, this may be taken advantage of by demurrer. If the petition is satisfactory in these respects, the objection to the jurisdiction of the court may be taken by plea.[8] But a plea to the jurisdiction will not be allowed after a traverse, without leave of the court.[9] If the United States file a general traverse to a petition

246; s. c., 4 Ct. Cl. 113; Fain *v.* United States, 4 Ct. Cl. 237; Mildrim *v.* United States, 7 Ct. Cl. 595.

[1] Headman *v.* United States, 5 Ct. Cl. 640.

[2] Schreiner *v.* United States, 6 Ct. Cl. 359.

[3] Wilson *v.* United States, 1 Ct. Cl. 318; Parish *v.* United States, 1 Ct. Cl. 345.

[4] Jackson *v.* United States, 1 Ct. Cl. 260; Crowell *v.* Jackson, 6 Id. 23; Silverhill *v.* United States, 5 Id. 610.

[5] Morgan *v.* United States, 14 Ct. Cl. 319.

[6] Pierce *v.* United States, 1 Ct. Cl. 195; Benton *v.* United States, 5 Id. 692; Baird *v.* United States, 8 Id. 13.

[7] Griffin *v.* United States, 13 Ct. Cl. 257.

[8] Pennsylvania Co. *v.* United States, 7 Ct. Cl. 401; Graham *v.* United States, 1 Id. 183; Pierce *v.* United States, Id. 195.

[9] Id.

that is not verified, they thereby waive a want of verification;[1] and if they do not traverse an allegation of loyalty, it will be presumed to be true.[2] If a corporation is claimant, and it is averred in the petition that it was duly created a corporation, its incorporation need not be proved, unless this allegation is specially traversed[3]

[1] Griffin *v.* United States, 13 Ct. Cl. 257.

[2] Hill *v.* United States, 8 Ct. Cl. 470.

[3] Hebrew Congregation *v.* United States, 6 Ct. Cl. 241; United States *v.* Insurance Companies, 22 Wall. 99.

The following observations are made in the monograph of Judge Richardson, before referred to, in relation to the practice in this court:

"All cases are tried in the Court of Claims with the same formalities as are cases between individual litigants in the courts of common law as to the admissibility of evidence, the examination and cross-examination of witnesses, and the application of legal principles, and the rights of claimants are guarded and protected by the established rules of law as administered in other courts.

"The procedure and practice have been improved and simplified by Congressional enactments and by the rules adopted by the court from time to time, as suggested in the course of its experience of more than twenty-six years, until a system has grown up and become established of the utmost convenience to parties and counsel, wherever they may reside.

"Claimants must file their petitions properly setting out their cases, and must prove their claims by competent evidence. But as the court is held at Washington, and has jurisdiction of cases which arise in distant and different parts of the country, Congress has provided that 'the testimony shall be taken in the county where the witness resides, when the same can be conveniently done.'

"When, therefore, a claimant has filed his petition, which he may do by sending it to the clerk of the court by mail or otherwise, he may, at his leisure and convenience, go on taking the depositions of witnesses whenever and wherever he can find them, first giving notice to the Attorney-General, that he may be present himself, or by an assistant, to cross-examine them.

"The court is authorized by law to call upon any of the departments for any information or papers it may deem necessary, and it always does so in proper cases on motion of claimants; and thus they can readily obtain whatever information and evidence affecting the issues involved are contained in the archives of the government.

"Parties filing petitions, pleadings and motions, except motions for calls on the departments, are required by the rules to leave with the clerk at the same time written notice thereof, addressed to the attorney of the adverse party, with postage prepaid, and the clerk is required to mail the same, and to note the fact on the general docket; and all notices may be served in the same manner. Printed blanks are furnished to parties for this purpose. Upon the receipt by the clerk of an answer to a call upon a department, he is required also to notify the claimant's counsel and Attorney-General of the fact by mail. By these rules attorneys in any place, however distant from Washington, are informed at once, and therefore always know of every paper filed in their cases without being obliged to watch the state of the clerk's docket.

"When the claimant has closed his proof, he may give notice to the Attorney-General to that effect, by an entry in the notice book in the clerk's office. In two months thereafter, unless the Attorney-General asks for further time, the claimant may have his case placed on the trial list.

"Before a case is placed on the trial list, however, the claimant must file in the clerk's office twenty-five printed copies of his brief and his proposed findings of fact, and the Attorney-General has one month thereafter in

For forms of pleadings in this court, see *post*, under head of "Forms for the Court of Claims."

which to file a brief and request for findings of fact on his part.

"If counsel live at a distance, the court will, on application, assign a day certain for the hearing of his case, so that he need not be detained, as he may be in other courts, awaiting his turn; or he may file his request for findings of fact, briefs and argument by forwarding them to the clerk by mail, and thus he may be relieved from going to Washington at all during the progress of the case, from beginning to end of the proceedings.

"No fees or costs are taxed or allowed by the court, and if the claimant loses his case he is not subjected to a bill of cost. Of course, parties must pay for the taking of the depositions which they themselves require in establishing their claims, but if defeated they are not required to pay for the depositions of their adversaries.

"The evidence is printed at the government printing office, and that and all other documents in each case are made into records for the use of the court and the parties.

"The court has no jury. All questions of law and of fact are submitted to the five judges, and each judge reads over the whole record, so that there is not the same necessity for oral arguments as in the common law courts.

"There is a provision still standing in the Revised Statutes, in terms applying to all cases in the court, requiring claimants to set forth in their petitions, and to prove affirmatively, that they have at all times borne true faith and allegiance to the government and have not voluntarily aided, abetted or given encouragement to rebellion. But since the decision of the Supreme Court in relation to a similar clause in the captured and abandoned property act, which has been hereinbefore referred to, declaring the constitutional effect of the proclamation of general pardon and amnesty issued by the President in December, 1868, to be the relief of all persons from such a restriction upon their rights, the practice has been not to require an allegation of loyalty in the petition, or proof of it at the trial.

"The defence of all claims is confided by law to the Attorney-General, who assigns one of the assistant attorneys-general, with an adequate number of assistants, to that special duty under his own supervision, and who occasionally makes the argument himself in cases of unusual importance and magnitude. The rights and interests of the United States are therefore ably and amply protected. Indeed, in two particulars, the United States are greatly favored in their defences by provisions of law which do not apply in any other courts. No claimant, nor any person from or through whom any such claimant derives his alleged title, claim or right, nor any person interested in any such title, claim or right, is a competent witness in supporting the same, while all such persons may be witnesses to defeat them. Cases against the District of Columbia and some cases specially referred to the court are expressly exempted by law from this provision.

"At any time within two years next after the final disposition of any claim, on motion made in behalf of the United States, the court may grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong or injustice in the premises has been done to the United States; and this may be done while an appeal is pending in the Supreme Court, or after the judgment has been affirmed by that court, or even after it has been paid at the treasury. But new trials on motion of claimants can only be granted for the same reasons which, by the rules of common law or chancery, in suits between individuals, would furnish sufficient ground for new trials, and every such motion must be made at the term in which judgment is rendered, and before the

§ 433. **The petition may be amended.**—Great liberality is extended by this court in allowing amendments. If a petition is defective in its averments it may be amended; but not without

commencement of the summer vacation.

"Moreover, it is expressly provided by statute that any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment or allowance of any claim, or any part of any claim, shall, *ipso facto*, forfeit the same to the government; and it is made the duty of the court, in such cases, to find specifically that such fraud was practiced or attempted, and to give judgment that the claim is forfeited, and that the claimant be forever barred from prosecuting the same.

"The first appeal case which went to the Supreme Court was sent up with a full copy of the whole record, evidence and all, just as all cases had been previously reported to Congress under the former law. But that case was dismissed for want of jurisdiction in that court to hear appeals from the Court of Claims, by reason of the section which gives a revisory power to the Secretary of the Treasury to review its judgments, as has been already stated. When that section was repealed, and the Supreme Court sustained the appellate jurisdiction conferred by other provisions of the act, they foresaw that with the whole records sent up they would encounter the same difficulty which Congress had experienced—the utter impossibility of devoting sufficient time to the consideration of such a mass of evidence, and of undertaking to review the findings of fact thereon. Therefore, in the year 1866, under the act of March 3, 1863, they wisely made rules requiring the Court of Claims to find the facts, and confining the hearing on appeal to the questions of law raised thereon. These rules, as subsequently modified, now stand as follows:

"'In all cases hereafter decided in the Court of Claims in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:

"'1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments and decrees as may be necessary to a proper review of the case:

"'2. A finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as part of the record.

"'3. In all cases an order of allowance of appeal by the Court of Claims, or the chief justice thereof in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal.

"'4. In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of facts and their conclusions of law therein, in open court, before or at the time they enter judgment in the case.

"'5. In every such case, each party, at such time before trial, and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact.'

"The practice now is for the Court of Claims, after hearing or reading, as the case may be, the arguments of counsel on both sides, and after each judge has thoroughly read over the whole record by himself, and considered the requests of the opposite parties, to draw up findings of fact. It is easy to see that the duties of the judges in this respect, and in coming

leave of the court.[1] Thus if a petition is not verified it may be amended in this respect.[2] So a petition may be so amended as to show that another party has an interest in the claim, or where there are joint owners of property on which the claim is based an amendment of the petition will be allowed to enable the claimants to sever in the prayer for relief, and to ask for separate judgments.[3] So an amendment will be allowed to sustain and protect the original cause of action, as by allowing an administrator to take the place of a guardian of the deceased, and the husband the place of the wife in certain cases.[4] So if two joined in a petition for a claim and only one is entitled to recover, the petition may be amended by striking out the name of the disinterested party.[5]

§ 434. **Consolidation and intervention.**—If the assignees of vouchers issued under the same contract bring suits separately in the name of the assignor, the suits may be consolidated.[6] So if

to an agreement on each one of the facts which are considered material, often very numerous, as well as in reducing to concise written statements the facts agreed upon by them, are laborious, difficult and perplexing. But all that has to be done, and is done. Upon the findings of fact thus drawn up the court applies the law, delivers opinions, and enters judgments in accordance therewith. The concurrence of three judges is made necessary by statute to the rendition of any judgment.

"If the judgment is against a claimant in any case where the amount in controversy exceeds three thousand dollars, he may, within ninety days thereafter, appeal to the Supreme Court on the law. The United States may appeal in like manner from any judgment adverse to the government without reference to the amount in controversy. Before the passage of the Revised Statutes the United States could not appeal in cases involving less than three thousand dollars, unless the chief justice certified that the judgment or decree would affect a class of cases, or furnish a precedent for future action of an executive department of the government in the adjustment of such class of cases, or a constitutional question. But this restriction on the right of appeal by the defendants was omitted from the Revised Statutes, apparently by mistake, and since then several appeals have been taken on the part of the United States in cases involving small amounts, without such certificate, although probably they did, in fact, belong to a class of cases pending in the departments. There are other provisions in the law and the rules of the court in relation to the details of practice which do not require particular mention."

[1] Jones *v.* United States, 1 Ct. Cl. 383; Shaw *v.* United States, 9 Ct. Cl. 301; Griffin *v.* United States, 13 Ct. Cl. 257.

[2] Id.; Cross *v.* United States, 14 Wall. 479; s. c., 5 Ct. Cl. 88.

[3] Mott *v.* United States, 3 Ct. Cl. 218.

[4] Bellocque *v.* United States, 8 Ct. Cl. 493.

[5] Molina *v.* United States, 6 Ct. Cl. 269. So, if husband and wife are joined as claimants, and he alone is entitled to the claim, her name may be stricken from the petition: Benton *v.* United States, 5 Ct. Cl. 692. So also, where a *feme covert* and husband sue, and he dies, she may prosecute the suit alone, if the claim belongs to her: Rodden *v.* United States, 6 Ct. Cl. 308.

[6] Crowell *v.* United States, 6 Ct. Cl. 23.

the goods of several owners become commingled, the claims of the several claimants therefor may be consolidated, and they be permitted to litigate with each other.[1]

If one claims money in the court, which is also claimed by another, the former may file a petition of intervention in the case;[2] and if there are several claimants of the same fund in court, and they intervene or are united with the original claimant, the latter will be first required to make out a case only against the United States, after which the others will be permitted to establish their rights as against the original claimant.[3]

§ 435. **When a cause will be remanded for further proof.** — If there is omission to furnish certain proof which can be readily supplied, the cause will be remanded for further proof, even after a hearing.[4] And where it appears on a hearing of a cause that there are documents which have been introduced as evidence in the case that are not competent evidence, it may be remanded to give the parties an opportunity to furnish competent evidence or make some stipulation concerning the matter.[5] But a cause will not be remanded for further proof, so as to enable either party to furnish additional evidence to make his side of the case appear plainer, where there has been only a conflict of evidence.[6] When a cause is remanded for further proof either party may re-examine a witness whose testimony has already been taken, and either party may take further testimony; as every issue is open to controversy on the second trial.[7]

§ 436. **Burden of proof of loyalty; when the petition will be dismissed.**—The allegations of the petition, as to true allegiance and not voluntarily aiding and abetting or giving encouragement to the rebellion against the government, may be traversed by the government, and if on the trial such issues shall be decided against the claimant, his petition must be dismissed unless he is within the

[1] United States *v.* Raymond, 92 U. S. 651; Woodruff *v.* United States, 4 Ct. Cl. 486.

[2] Meziex *v.* United States, 6 Ct. Cl. 232; Turner *v.* United States, 2 Ct. Cl. 390.

[3] Woodruff *v.* United States, 4 Ct. Cl. 486; Boyd *v.* United States, 9 Ct. Cl. 419.

[4] Daniels *v.* United States, 5 Ct. Cl. 65; Crowell *v.* United States, 6 Ct. Cl. 23; Mahan *v.* United States, 6 Ct. Cl. 831; Fendall *v.* United States, 12 Ct. Cl. 305.

[5] Lender *v.* United States, 5 Ct. Cl. 544.

[6] Crowell *v.* United States, 6 Ct. Cl. 23. See also Shrewsbury *v.* United States, 13 Ct. Cl. 183.

[7] Culleton *v.* United States, 5 Ct. Cl. 627; Gaither *v.* United States, 3 Ct. Cl. 191.

provisions of the proclamation of general pardon.[1] The claimant in all such cases, as we have stated, has until recently been required to prove affirmatively that the person or persons upon whose loyalty his claim depends did consistently adhere to the United States and give no aid or comfort to persons engaged in the rebellion; and the voluntary residence of any such person in any place where the rebel force or organization held sway was by statute made *prima facie* evidence that such person did give aid and comfort to said rebellion and to the persons engaged therein.[2]

§ 437. **Aid and comfort to the rebellion must have been voluntarily given.**—The statute last cited did essentially change the proof required by previous ones.[3] Any voluntary acts which tend to assist, countenance, abet or encourage the rebellion or persons engaged in the rebellion, done or committed by the claimant with the intention and for the purpose of aiding the rebellion or of promoting its power and success, would defeat his claim.[4] But it is not sufficient to show a purpose to give aid and comfort: the aid and comfort must have been actually given.[5] And acts of affection or humanity rendered to persons engaged in the rebellion, or contributions and taxes paid where the rebel authority had sway, but extorted by a force and power that could compel submission, do not constitute aid and comfort to the enemy within the meaning of the statute.[6]

Where an administrator claimed property held by him as administrator, and which was taken from him as captured or abandoned, it was held that a right to recover the proceeds of the same would depend upon his loyalty and not upon that of the decedent or of the distributees.[7] If the claimant is a mere trustee, his right to recover for the benefit of the beneficiaries does not depend upon his loyalty, but that of the beneficiaries entitled to the claim.[8]

§ 438. **The effect of a pardon and amnesty; burden of proof.**—The proclamation of pardon and amnesty is a complete exemption

[1] Rev. Stat. § 1073.

[2] Rev. Stat. § 1074, 15 U. S. Stat. 75.

[3] United States *v.* Padelford, 9 Wall. 531; Grossmeyer *v.* United States, 4 Ct. Cl. 1.

[4] Bond *v.* United States, 2 Ct. Cl. 528; Bates *v.* United States, 4 Ct. Cl. 569; United States *v.* Padelford, 9 Wall. 531; Grossmeyer *v.* United States, 4 Ct. Cl. 1.

[5] Hill *v.* United States, 8 Ct. Cl. 470.

[6] Grossmeyer *v.* United States, 4 Ct. Cl. 1.

[7] Carroll *v.* United States, 13 Wall. 351; s. c., 5 Ct. Cl. 620; Carroll *v.* United States, 7 Ct. Cl. 589.

[8] Stoddart *v.* United States, 6 Ct. Cl. 340.

of a claimant from disability growing out of giving "aid and comfort to the rebellion," if he took the oath of amnesty required by the terms of the President's proclamation. The pardon and oath blots out the offence, and on proof of these no proof will be required that he was loyal during the rebellion.[1]

If a claimant resided during the rebellion where the rebel force held sway, and has not obtained a pardon, the burden of proof is upon him to show his loyalty to the government during the rebellion.[2]

In case of an alien, it is not essential for him to show that he during the rebellion adhered to the United States, but it will be enough to show that he observed a strictly neutral course through the war, and gave no aid or comfort to the rebellion.[3] Residence of an alien in a foreign country during the war of the rebellion raises a presumption of neutrality.[4] So it has been held that there is a presumption of loyalty in favor of a person who was a citizen and resident of a loyal state during such war;[5] and that very slight evidence suffices to establish the loyalty of a colored person residing within a rebellious state during the war.[6]

§ 439. **Acts of aid and comfort to the rebellion.**—Where a person was voluntarily connected with the violation of the blockade laws; and where a person sold goods to an agent of the rebellious government who bought them to aid the rebellion; and where a person became surety on the official bond of an officer in the military service of the rebels; and where a person entered the military service of the rebellious states, which he could have avoided; these parties were respectively held to have given aid and comfort to the rebellion.[7]

§ 440. **The court may appoint commissioners to take testimony.**—There is conferred upon the Court of Claims power to appoint com-

[1] Carlisle *v.* United States, 16 Wall. 147; Armstrong *v.* United States, 13 Wall. 154: s. c., 5 Ct. Cl. 623; United States *v.* Padelford, 9 Wall. 53; s. c., 4 Ct. Cl. 316; United States *v.* Klein, 13 Wall. 128; s. c., 4 Ct. Cl. 559; Hamilton *v.* United States, 7 Ct. Cl. 444; Backer *v.* United States, 7 Ct. Cl. 551.

[2] United States *v.* Burns, 12 Wall. 246: s. c., 4 Ct. Cl. 113; Deerson *v.* United States, 5 Ct. Cl. 626; Deerson *v.* United States, 6 Ct. Cl. 227.

[3] Rothschild *v.* United States, 6 Ct. Cl. 204.

[4] Hill *v.* United States, 8 Ct. Cl. 470.

[5] Turner *v.* United States, 3 Ct. Cl. 400.

[6] Thomas *v.* United States, 3 Ct. Cl. 52; Dereef *v.* United States, 3 Ct. Cl. 163.

[7] Bates *v.* United States, 4 Ct. Cl. 569; Carlisle *v.* United States, 16 Wall. 147; United States *v.* Padelford, 9 Wall. 531; Kuper *v.* United States, 3 Ct. Cl. 74. But where a party became interested in an adventure to run the blockade, it was held that this was not giving aid and comfort to the rebellion, unless the adventure was put afloat: Hill *v.* United States, 8 Ct. Cl. 470.

missioners to take testimony to be used in the investigation of claims which come before it. The court also has the authority to prescribe the fees of such commissioners for the taking of testimony, and to issue commissions for the taking of testimony, whether at the instance of the claimant or of the United States.[1]

The testimony to be used in this court must be taken by deposition;[2] and *ex parte* affidavits cannot be used as evidence, although they are transmitted to the court, with the petition, by Congress.[3]

§ 441. **Application for a commission, and practice thereon.**—Application for the issue of a commission to take testimony in a case may, as a general rule, be made at any time before trial, and when made, an order will always be entered by the clerk therefor, as of course.[4] But if the issue of a commission and the taking of testimony, and a return of the same, will require a postponement of case, the court may determine whether it should issue and whether a trial should be postponed under all the circumstances of the case.[5]

§ 442. **Mode of taking depositions.**—The depositions of witnesses should be written out in the usual way, with questions and answers thereto immediately following, under oath. They should be read over to and signed by each witness deposing, and must state that the witness testified in the presence of all the parties. And if an addition is made after the attorney of one of the parties has left, it will on motion be stricken out.[6] The commissioner should so connect the sheets together and seal them that they cannot be removed or tampered with, and both he and the witness should place their names on each sheet of paper.[7] For forms, consult those furnished for circuit court commissioners. See *post*.

§ 443. **When a witness may be re-examined.**—Usually, when the right to examine a witness has been exercised it is exhausted, and no re-examination of the witness can be had unless by leave of the court, granted on a proper application made therefor. If a party neglects so to apply, and takes a second deposition of the same

[1] Rev. Stat. § 1075.
[2] Hughes *v.* United States, 4 Ct. Cl. 64.
[3] Clark *v.* United States, 1 Ct. Cl. 246; McKee *v.* United States, Id. 336; Wilde *v.* United States, 7 Id. 415.
[4] Mahan *v.* United States, 6 Ct. Cl. 331.
[5] Atocha *v.* United States, 6 Ct. Cl. 95.
[6] Martin *v.* United States, 3 Ct. Cl. 384; Shrewsbury *v.* United States, 9 Id. 333.
[7] Martin *v.* United States, 3 Ct. Cl. 384.

witness, the court will exercise its discretion as to admitting it in evidence on the trial, if it is objected to.[1]

§ 444. **Objections, how and when taken.**—Objections to parol evidence of the contents of a written instrument should be taken at the examination, for secondary evidence is admissible if no objection thereto is made; and so objection to the form of the question, as that it is leading, must be then made, as even leading questions may be allowed, and especially if no objection is made. But objections which relate to the manner and form of taking or returning depositions may be taken at any time before a hearing of the case on its merits.[2]

§ 445. **The court may call upon any of the departments for information; evidence; witnesses.**—This court has authority to call upon any of the departments for any information or papers it may deem necessary, and is entitled to the use of all recorded and printed reports made by the committee of each house of Congress when deemed necessary in the prosecution of its business. But the head of a department of the government may refuse to comply with such request if in his opinion a compliance would be injurious to the public interest.[3] And if it appears to the court that the facts set forth in a petition do not furnish ground for relief, the court should refuse to allow the taking of testimony.[4] No witness can be excluded in any suit in the Court of Claims on account of color.[5] But no claimant nor any person from or through whom he derives title, claim or right against the United States, nor any person interested in such title, claim or right, is a competent witness in this court to support the same, except at the instance of the attorney or solicitor appearing in behalf of the United States.[6]

The statutory provision we have noticed excluding as witnesses those having an interest in the claim against the government is the old common law doctrine as it stood before the adoption of the act of Congress of July 16, 1862, now incorporated into section 858 of

[1] Mahan *v.* United States, 6 Ct. Cl. 331; Sevier *v.* United States, 7 Id. 388, in which it was held, if leave was given to re-examine upon a particular point, the witness cannot be examined on other matters.

[2] Hughes *v.* United States, 4 Ct. Cl. 64. If the deposition is taken upon written interrogatories, and in answer to a question the witness deposes as to the contents of a written instrument, then objection may be taken after the return of the deposition, as that would be the first opportunity to object: Id.

[3] Rev. Stat. § 1076.

[4] Rev. Stat. § 1077.

[5] Rev. Stat. § 1078.

[6] Rev. Stat. § 1079.

the Revised Statutes. The latter section provides that no witness shall be excluded in any civil action because he is a party or interested in the issue to be tried, except in certain special cases.[1] But if the claim is against the United States, neither the claimant can testify, nor the assignor of a claim transferred after it had accrued to him, nor any one who is interested in the event of the suit.[2]

But *ex necessitate*, on general principles of evidences in such cases, he is competent to prove the contents of a lost package, where his right, title and claim to recover, or for relief, has been clearly established by other competent evidence.[3]

If a corporation is a claimant, the trustees of the corporation are competent witnesses, as they are not supposed to be interested.[4] So where a party sold property to the claimant, and it was afterwards captured by the United States, the former was held to be a competent witness to sustain the claim therefor.[5] So if a witness has testified against a claim, his testimony will not be excluded, however manifest his interest may be in the claim. Those only are incompetent on account of interest who have an interest in sustaining the claim.[6]

§ 446. **When the claimant may be examined as a witness.**—At the instance of the attorney or solicitor appearing on behalf of the United States, the court may make an order in any case pending therein, directing the claimant to appear upon reasonable notice before any commissioner of the court and be examined touching any or all of the matters pertaining to the claim. Such examination is required to be reduced to writing by the commissioner and to be returned to and filed in the court, and it may, in the discretion of the attorney or solicitor of the United States appearing in the cause, be read and used in evidence on the trial of the cause. If the claimant fails to appear or refuses to testify or answer as to all mat-

[1] Rev. Stat. § 858; United States *v.* Clark, 96 U. S. 37; s. c., 11 Ct. Cl. 698; Jones *v.* United States, 1 Ct. Cl. 383; McKee *v.* United States, 1 Ct. Cl. 336; Brooke *v.* United States, 2 Ct. Cl. 180; Stoddart *v.* United States, 4 Ct. Cl. 511.

[2] United States *v.* Anderson, 9 Wall. 56.

[3] United States *v.* Clark, 96 U. S. 37; s. c., 11 Ct. Cl. 698.

[4] Hebrew Congregation *v.* United States, 6 Ct. Cl. 241.

[5] United States *v.* Anderson, 9 Wall. 56; Grossmeyer *v.* United States, 4 Ct. Cl. 1.

[6] Wood *v.* United States, 10 Ct. Cl. 395. A surety on a bond, given by the claimant to the United States to secure the fulfillment of a contract on which the claim is based, is not competent to testify in favor of the claimant: Id.; Macauley's Case, Ct. Cl. 575.

ters within his knowledge material to the issue after reasonable notice thereof, the court may order that such cause shall not be brought forward for trial until he shall have fully complied with the order of the court in the premises.[1]

Under the provisions of the section last cited, it has been held that no order can be made for the examination of the assignor of the claimant. The examination provided for by this section is limited to the claimant himself, and cannot be extended to other persons. He alone by the provisions of the section can be held responsible for his non-attendance as a witness, after reasonable notice; he alone can be affected by his refusal to testify; and it is only for his refusal that the court can delay the trial until he shall have fully complied with the order of the court in that behalf.[2]

For forms for the Court of Claims, see *post*.

§ 447. **The testimony to be taken in the county where the witness resides; how witnesses compelled to attend.**—The statute particularly requires that the testimony in cases pending in this court shall be taken in the county where the witness resides, when it can be conveniently done; and the court may issue subpœnas to require the attendance of a witness before any person appointed commissioner by the court for that purpose; and the subpœnas have the same effect as if issued from any district court, and compliance therewith may be compelled under rules and orders of the court.[3]

§ 448. **Either party may cross-examine witnesses.**—The statute provides that in taking testimony to be used in support of a claim, the United States shall have an opportunity to file interrogatories, or by attorney to examine witnesses under such regulations as the court may prescribe; and that like opportunities shall be afforded to the claimant in cases where testimony is taken on behalf of the United States under like regulations.[4] And the commissioner taking testimony to be used in this court is required to administer an oath or affirmation to the witnesses brought before him for examination.[5]

§ 449. **Fees of the commissioner and other expenses; by whom paid.**—The fees of the commissioner before whom a deposition is

[1] Rev. Stat. § 1080.
[2] Macauley *v.* United States, 11 Ct. Cl. 575.
[3] Rev. Stat. §§ 1081, 1082.
[4] Rev. Stat. § 1083.
[5] Rev. Stat. § 1084.

taken, and the costs of the commission and notices, shall be paid by the claimant, when the testimony is taken on his behalf; but when taken at the instance of the government such fees, together with all postage incurred by the Assistant Attorney-General, shall be paid out of the contingent fund provided for the Court of Claims, or other appropriation made by Congress for that purpose.[1]

§ 450. **When claims will be forfeited for fraud.**—"Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement or establishment or allowance of any claim against the United States, shall *ipso facto* forfeit the same to the government; and it shall be the duty of the Court of Claims in such cases to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the government, and that the claimant be forever barred from prosecuting the same."[2]

§ 451. **The judgment or decree.**—The judgment or decree of the Court of Claims on a final hearing, if in favor of the claimant, must be for a certain specific sum.[3] If the claim is made by an accounting officer, for a loss of the money or other property of the United States without his fault, the court should decree in his favor the amount thereof.[4] A proceeding to recover the proceeds of captured or abandoned property is in the nature of a proceeding *in rem*, and is in effect an information against a fund in the possession of the United States, held for the parties interested in it. There can be no liability in such a case if there is no fund. If it has been consumed in expenses or other legitimate purposes, there is no ground for the claim. If only a part of the original fund remains, the balance having been paid out under a judgment, or been released to other claimants having an interest in it, by the Secretary of the Treasury, the claimant can only obtain judgment for the balance.[5] For forms of judgment or decree of the Court of Claims, see *post*, Forms for the Court of Claims.

§ 452. **When the court may grant a new trial.**—"When the judgment is rendered against any claimant the court may grant a new

[1] Rev. Stat. § 1085.
[2] Rev. Stat. § 1086.
[3] United States *v.* Anderson, 9 Wall. 56; s. c., 4 Ct. Cl. 467; Brown *v.* United States, 6 Ct. Cl. 171.
[4] Rev. Stat. § 1062.
[5] Thomas *v.* United States, 12 Ct. Cl. 273; Sharp *v.* United States, 12 Ct. Cl. 638; Seviere *v.* United States, 7 Ct. Cl. 388; Winchester *v.* United States, 14 Ct. Cl. 13; s. c., 99 U. S. 1372; United States *v.* Villalonga, 23 Wall. 35.

trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial."[1]

The general principles of the law will be observed in granting new trials by this court. Thus, a new trial will not be granted on the ground of newly-discovered evidence, if it could have been discovered with due diligence before the trial. And even where due diligence has been used for this purpose, a new trial will not be granted unless it is made to appear that a different conclusion would probably be reached if the new evidence was before the court.[2] Nor will a new trial be granted merely because the amount involved is too small to allow an appeal.[3] But if the decision is founded upon a mistake of law, the claimant may have a review.[4] So if the judgment is entered upon matters not properly in evidence, it will be vacated and a new trial granted.[5]

A new trial will not be granted on the ground that the Supreme Court has made some decisions since the judgment that might entitle the claimant to a judgment in his favor;[6] nor on the ground of a mistake in fact, unless one of the judges who joined in rendering the judgment desires a reargument after examining the grounds of mistake upon which it is asked.[7] The mode of seeking a new trial would be the usual one, by motion in writing, stating specifically the particular grounds upon which it is based, accompanied by the usual affidavits of facts outside the record where it rests upon such facts.

§ 453. **When a new trial will be granted on the motion of the United States.**—At any time while a claim is pending before the Court of Claims, or on appeal from it, or within two years next after the final disposition of it, the court may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong or injustice in the

[1] Rev. Stat. § 1087.

[2] Garrison *v.* United States, 2 Ct. Cl. 382; Armstrong *v.* United States, 6 Ct. Cl. 226; Deeson *v.* United States, 6 Ct. Cl. 227; Bramhall *v.* United States, 6 Ct. Cl. 238; Child *v.* United States, 6 Ct. Cl. 44; Silvey *v.* United States, 7 Ct. Cl. 305.

[3] Deeson *v.* United States, 6 Ct. Cl. 227.

[4] Calhoun *v.* United States, 14 Ct. Cl. 193.

[5] Alvord *v.* United States, 9 Ct. Cl. 133.

[6] Bramhall *v.* United States, 6 Ct. Cl. 238.

[7] Fendall *v.* United States, 12 Ct. Cl. 305.

premises has been done the United States; but until some order is made staying the payment of the judgment, the same is payable as provided by law in other cases.[1]

The words "final disposition," used in the section last cited, have been construed to mean the final disposition on appeal, if an appeal is taken, and if none is taken, then the final decision of the Court of Claims; and that court may grant a new trial, in the case provided for, at any time within two years after a final disposition, even though it may have been affirmed on appeal in the Supreme Court.[2]

If after a "final disposition" of a claim a motion for a new trial is granted by the Court of Claims, after an appeal is taken and while it is pending, this vacates the former judgment, and the court resumes the control of the case and the parties, and the Supreme Court will not grant a certiorari to bring up the proceedings subsequent to the appeal; but after a final judgment on the new trial the case may be taken to the Supreme Court for review.[3] The proper course to take in such a case would be to move to dismiss the appeal in the Supreme Court on a proper showing of the facts, or to have the cause continued in the Supreme Court. But the mere filing of a motion for a new trial would be no ground for dismissing the cause in that court,[4] although the cause may be continued to await the decision on the motion for a new trial.

One of the grounds for obtaining a new trial under the provisons of the section of the Revised Statute last referred to is that some "injustice has been done to the United States." The injustice contemplated by this provision is not that resulting merely from judicial errors committed on the trial, but such as are discovered after the rendition of the judgment.[5] And a new trial will not be granted on the ground of newly-discovered evidence unless there was due diligence to discover it before the trial; and the obligation to use due diligence in such cases falls upon the officers whom the law requires to take official cognizance of the suit, or who are charged in law or in fact with its defence.[6] Nor will it be granted

[1] Rev. Stat. § 1088.

[2] *Ex parte* Russell, 13 Wall. 664; *Ex parte* United States, 16 Wall. 699.

[3] United States *v.* Young, 94 U. S. 258; United States *v.* Ayers, 9 Wall. 608.

[4] United States *v.* Crusell, 12 Wall. 175.

[5] Child *v.* United States, 6 Ct. Cl. 44.

[6] Silvey *v.* United States, 6 Ct. Cl. 305.

in any case on the ground of newly-discovered evidence, if the new evidence would not change the result; or for an error in law, where there is ample remedy by appeal.[1]

§ 454. **Final judgments of the Court of Claims; how paid.**—Section 1089 of the Revised Statutes provides for the payment of all judgments in this court, or on appeal in the Supreme Court in favor of claimants, as follows: "In all cases of final judgments in the Court of Claims, or on appeal, by the Supreme Court, where the same are affirmed in favor of the claimants, the sum due thereby shall be paid out of any general appropriation made by law for the payment or satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment certified by the clerk of the Court of Claims and signed by the Chief Justice, or in his absence by the presiding judge of said court."

The act of March 3, 1875,[2] restricts the provisions of the foregoing section, and makes it the duty of the Secretary of the Treasury in such cases, if the plaintiff or claimant is indebted to the United States in any manner, to withhold payment of an amount of such judgment or claim equal to the debt due to the United States. If the claimant assents to this, then it is the duty of the Secretary to execute a discharge of the debt due from the plaintiff or claimant to the United States. But if he denies the indebtedness to the United States, or refuses to consent to the set-off, then the Secretary is required to withhold of such further amount of such judgment or claim as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to a final judgment. If such is not already in suit, it is made the duty of the Secretary to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. If in such action judgment shall be rendered against the United States, or the amount recovered for the debt and costs shall be less than the amount withheld, he is required to pay over the balance to the plaintiff, with six per cent. interest thereon for the time it has been so withheld from him.

This provision requires the amount of any debt due from the

[1] Ealer *v.* United States, 5 Ct. Cl. 708; Child *v.* United States, 7 Ct. Cl. 305. A decision on a motion for a new trial cannot be taken to the Supreme Court by appeal: Young *v.* United States, 99 U. S. 641.

[2] Ch. 149, 18 Stat. 481.

claimant to the United States to be withheld by the Secretary of the Treasury, although this might have been set up as a defence to the claim. The statute conferring jurisdiction on the court gives it jurisdiction to hear and determine "all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government of the United States against any person making claim against the government in said court." As a general rule, in suits between private parties, such a defence should be made in the original suit; but, as the allowance of such suits against the government is a mere matter of grace, it has a legal right to impose such conditions and restrictions in the premises as it thinks proper. Experience has probably shown that legal defences on the part of the government are frequently overlooked, or, through negligence of officers or otherwise, not made.

The term general appropriation for private claims, used in the statute, has been held to mean appropriations made for the payment of debts which were not paid out of the specific appropriations.[1] If the claimant consents to take the balance due him after deducting the set-off claimed by the Secretary, and discharges the judgment, he thereby waives the right to have the validity of the debt tested by legal proceedings.[2]

§ 455. **Interest on judgments of the Court of Claims affirmed in the Supreme Court.**—Where a judgment is affirmed in the Supreme Court, in favor of the claimant, on an appeal from the Court of Claims, interest thereon at the rate of five per centum must be allowed from the date of its presentation to the Secretary of the Treasury for payment, as aforesaid. But no interest can be allowed subsequent to the affirmance unless presented as aforesaid to the Secretary of the Treasury.[3] No interest can be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating therefor.[4] But where a factor filed a claim against the proceeds of captured property, which exceeded his claim, he was allowed interest from the time his claim accrued up to the time of the rendition of the judgment.[5] And where a claim was referred to the Court of

[1] Sweeny *v.* United States, 5 Ct. Cl. 285.

[2] Bonnafon *v.* United States, 14 Ct. Cl. 484.

[3] Rev. Stat. § 1090.

[4] Rev. Stat. § 1091; Todd *v.* United States, Dev. (C. C.) 175; Tilson *v.* United States, 100 U. S. 43.

[5] Villalonga *v.* United States, 10 Ct. Cl. 428; s. c., 23 Wall. 35.

Claims under a special act of Congress, to be determined according to "rules and regulations heretofore adopted by the United States in the settlement of like cases," it was held that interest might be allowed on the claim before the rendition of the judgment, if interest had been allowed by Congress in the adjustment of similar cases.[1]

§ 456. **Payment of the judgment a full discharge.**—The payment of the amount due upon any judgment of the Court of Claims and of any interest thereon allowed by law is a full discharge of the United States from all claim and demand touching any of the matters involved in the controversy.[2]

To constitute a bar to a future action the judgment must be one rendered on the merits;[3] and although the judgment may be erroneous, it is a bar to a second suit for the same cause of action.[4] But a judgment in one suit will not bar an action in another if the causes of action are different.[5] So an action for a breach of one covenant and a judgment therefor for the claimant will not bar another action for the breach of another covenant, even when both covenants are contained in the same instrument and both were broken at the time of the institution of the first suit.[6] So a judgment for rent upon one petition will not bar another suit to recover rent that was not due at the time of commencing the first suit.[7]

§ 457. **Appeals from the Court of Claims to the Supreme Court.**—Section 707 of the Revised Statutes provides for an appeal from the Court of Claims to the Supreme Court of the United States, as follows: "An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court as provided in section 1089."

There is an absolute right of appeal on behalf of the United States and also on behalf of the claimant where the amount in controversy exceeds the sum of three thousand dollars, or where his

[1] United States *v.* McKee, 91 U. S. 442; s. c., 10 Ct. Cl. 231.

[2] Rev. Stat. § 1093.

[3] Spicer *v.* United States, 5 Ct. Cl. 34.

[4] Osborne *v.* United States, 9 Ct. Cl. 153.

[5] Shrewsbury *v.* United States, 9 Ct. Cl. 263.

[6] Shrewsbury *v.* United States, 9 Ct. Cl. 263.

[7] Cross *v.* United States, 14 Wall. 479; s. c., 5 Ct. Cl. 88.

claim is forfeited to the United States by the judgment of the Court of Claims, as provided by the statute. The right to an appeal exists in all cases except where it is withheld, and it is not withheld from the government in any case where there is a judgment against them, nor from the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim has been forfeited.[1]

§ 458. **Right to appeal, not to writ of error.**—The statute gives the right to an appeal, but makes no provision for a writ of error, and hence the Supreme Court cannot proceed on a writ of error to review a decision of the Court of Claims.[2]

§ 459. **Time and manner of taking appeals.**—Appeals from the Court of Claims must be taken within ninety days after the judgment or decree is rendered, and are allowed under such regulations as are or may be prescribed by the Supreme Court.[3]

§ 460. **Regulations prescribed by the Supreme Court of the United States relating to appeals from the Court of Claims.**—The Supreme Court of the United States has prescribed rules regulating appeals from the Court of Claims. One rule provides that where appeals are allowable they shall be heard in the Supreme Court upon the following record:

"1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments and decrees as may be necessary to a proper review of the case.

"2. A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts upon which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as a part of the record."[4] If a statute confers on the Court of Claims jurisdiction over a new subject, an appeal lies from a decision relating thereto the same as in other cases.[5]

§ 461. **Application for allowance of appeals; within what time to be made.**—Rule 3 provides that "in all cases an order for the

[1] United States *v.* Adams, 6 Wall. 103; Klein's Cases, 7 Ct. Cl. 240.

[2] United States *v.* Young, 94 U. S. 258; Latham's Appeal, 9 Wall. 145.

[3] Rev. Stat. § 708.

[4] Rule 1 Ct. Cl., prescribed by the Supreme Court. See *post*, Rules for the Court of Claims.

[5] *Ex parte* Zellner, 9 Wall. 244.

allowance of appeal by the Court of Claims, or the Chief Justice in vacation, is essential, and the limitation of the time of granting such appeal shall cease to run from the time an application is made for the allowance."[1] An order for the allowance of an appeal does not absolutely and of itself remove the cause from the jurisdiction of the court; but an order revoking such an allowance may still be made.[2]

For appropriate forms on appeals, see *post*, Forms for the Court of Claims.

§ 462. **Findings of fact and conclusions of law filed in open court.** —Where either party is entitled to appeal, the Court of Claims is required to make and file their finding of facts and conclusions of law therein in open court, before or at the time they enter the judgment in the case.[3]

If a proper finding of facts is not sent up with the record, the Supreme Court will, on a motion duly made therefor, make an order directed to the Court of Claims, requiring it to make a proper return as to the existence of such facts. But it cannot direct the Court of Claims as to what finding it shall make, or how it shall proceed to make its findings on the points required to be certified.[4]

In the case provided for by the rule last cited each party, at such time before the trial and in such form as the court shall prescribe, shall submit to it a request to find all the facts which the party considers proven, and deems material to the due presentment of the case, in the finding of facts.[5]

The fourth and fifth rules we have just cited were undoubtedly designed to enable a party to secure a finding of fact upon any point material to the decision of the court; but the failure of the court to find the fact as a party alleges it to be will not justify the bringing of all the evidence on that subject before the Supreme Court. If the court refuses to make any finding on the point, the Supreme Court may order it to make a finding.[6]

If the Court of Claims refers a case pending therein to a special commissioner to state an account and find the facts, and his report has been heard upon exceptions filed thereto, and the court finds

[1] Rule 3 Ct. Cl., prescribed by the Supreme Court; United States *v.* Adams, 6 Wall. 101.

[2] *Ex parte* Roberts, 15 Wall. 384.

[3] Rule 4 Ct. Cl., prescribed by the Supreme Court.

[4] United States *v.* Adams, 9 Wall. 661.

[5] Rule 5 Ct. Cl., prescribed by the Supreme Court.

[6] Mahan *v.* United States, 14 Wall. 109.

the facts found sustained by the evidence, they will be returned to the Supreme Court, in case of an appeal of the case, as the finding of the court. And as to facts requested to be found by either party, and not found by the court, they should be certified up to the Supreme Court, with the reasons for the refusal.[1]

The record on appeals should be prepared strictly in accordance with the rules prescribed by the Supreme Court in relation thereto. Only such statement of facts should be sent up to the Supreme Court as may be necessary to enable it to decide upon the correctness of the rulings in the court below on propositions of law. The facts found by the court must be in such form as to raise the question of law decided by the court, and no evidence should be included.[2] Even a written agreement entered into by both parties that the evidence may be sent up to the Supreme Court with the required record of the case will not authorize the court to certify up such evidence.[3]

The finding of facts by the Court of Claims in the nature of a special verdict is conclusive in the Supreme Court on appeal, unless it is impeached for some error in law appearing in the record.[4] But where the Court of Claims certified up on appeal, as a part of its findings, all of the evidence on which a fact material to the judgment rendered was found, from which it appeared that there was no legal evidence to establish such fact, the Supreme Court reversed the judgment.[5]

§ 463. **Where a request is made to find facts.**—If a party entitled to appeal requests the finding of a material fact, which is refused by the court, although there is sufficient evidence to sustain it, the party aggrieved thereby may except to the ruling and have the matter reviewed on appeal.[6]

The request for the finding of particular facts must be in writing and made at the trial, and embrace all the material facts in the case; and if it be for an additional finding of facts, it should set forth specifically, distinctly and concisely the facts as to which a

[1] Lawrence *v.* United States, 8 Ct. Cl. 252.

[2] De Groot *v.* United States, 5 Wall. 419.

[3] Hubbel *v.* United States, 6 Ct. Cl. 53. It is only the ultimate facts or propositions which can be certified up, and not the evidence of facts: Id.

[4] United States *v.* Smith, 94 U. S. 214; United States *v.* Pugh, 99 U. S. 265.

[5] United States *v.* Clark, 96 U. S. 37.

[6] United States *v.* Adams, 9 Wall. 661.

finding is desired, and a reference should be made in the margin of the pages where the evidence to prove the facts may be found; but it should not ask that the finding be an amendment or alteration of the finding already made.[1] Decisions upon the admissibility of evidence, and orders made relating to the conducting of the trial, cannot be incorporated into the finding of the facts.[2] But if the Court of Claims admits questionable evidence, the sufficiency of the evidence, as we have seen, to sustain the finding may be reviewed on a proper statement of the facts.[3]

If the report of the commissioner appointed by the Court of Claims is adopted by the court, the finding of facts by him, together with such additional findings as the court may make, should be transmitted to the Supreme Court as the findings of the Court of Claims.[4]

If an ultimate fact can only be inferred from circumstantial facts, and there is any doubt as to the legal effect of these facts, the findings should set forth these circumstantial facts.[5] But the findings need not state the items of the amount of damages.[6] If all the evidence on which a fact is found is certified up with the record as a part of the finding, the evidence and the finding may both be examined to determine whether the evidence is competent and whether it establishes the fact found.[7] But if the court, upon request, states that a particular item of damages is included in its estimate of damages, the claimant may except to the finding on this point, and thus present, on appeal to the Supreme Court, the question whether the item is legally a matter for which damages can be recovered.[8] And if the finding of facts does not set forth the amount the claimant is entitled to recover, the judgment will be reversed.[9]

We will conclude our treatment of this subject by quoting the eloquent remarks of an eminent American lawyer relating to the constitution and functions of this court. He says:

[1] Raines *v.* United States, 11 Ct. Cl. 648; Neal *v.* United States, 14 Id. 477; Bright *v.* United States, 12 Id. 646.

[2] Blewett *v.* United States, 10 Ct. Cl. 235.

[3] M'Keever *v.* United States, 14 Ct. Cl. 396.

[4] Lawrence *v.* United States, 8 Ct. Cl. 252.

[5] United States *v.* Pugh, 99 U. S. 265; Calhoun *v.* United States, 14 Ct. Cl. 193.

[6] United States *v.* Smith, 94 U. S. 214.

[7] United States *v.* Clark, 96 U. S. 37.

[8] United States *v.* Smith, 94 U. S. 214.

[9] United States *v.* Clark, 96 U. S. 37.

"The court itself is the first-born of a new judicial era. As a judicial tribunal, it is not only new in the instance; it is also new in principle. So far as concerns the power of courts to afford redress, it has heretofore been fundamental that the sovereign can do no wrong. This court was erected as a practical negative upon that vicious maxim. Henceforth our government repudiates the arrogant assumption, and consents to meet at the bar of enlightened justice every rightful claimant, how lowly soever his condition may be.

"Prior to the institution of this court, all rights as against the nation were imperfect in the legal sense of the term; every duty of the nation was a duty of imperfect obligation. There was no judicial power capable of declaring either; no private person possessed the means of enforcing the one or coercing the other. But effectual progress has been made towards giving form and method to the administration of justice between the nation and the individual. This court enables the latter to obtain an authoritative recognition of his rights. No more is needed; for in no case can a state, after such a recognition, withhold payment and yet retain its place in the great family of civilized nations.

"The ordinary jurisdiction of the court bears a strong resemblance to the narrow cognizance at common law; but its extraordinary jurisdiction over all claims which may be referred to it by either house of Congress extends its power to the utmost limits attainable by juridical science in its fullest development. In this aspect its dignity and importance as a governmental institution cannot be too highly appreciated. As a means by which rightful claims against the government may be readily established, and those not founded in justice promptly driven from the portals of Congress, it must exercise a most healthful influence.

"But we are authorized to look higher than the mere convenience of suitors and the dispatch of public business. Enlightened patriotism will contemplate other and more important consequences. Caprice can no longer control. Here equity, morality, honor and good conscience must be practically applied to the determination of claims, and the actual authority of these principles over governmental action ascertained, declared and illustrated in permanent and abiding forms. As step by step, in successive decisions, you shall have ascertained the duties of government toward the citizen,

fixed their precise limits upon sound principles, and armed the claimant with means of securing their enforcement, a code will grow up giving effect to many rights not heretofore practically acknowledged.

"In it will be found enshrined for the admiration of succeeding ages an honorable portraiture of our national morality, and a full vindication of the eulogium recently pronounced upon our people by the highest authority in the parent state. 'Jurisprudence,' says Lord Campbell, in the Queen *v.* Millis, 'is the department of human knowledge to which our brothers in the United States of America have chiefly devoted themselves, and in which they have chiefly excelled.'"[1]

[1] Charles O'Conor, in "Great Speeches by Great Lawyers," p. 191.

CHAPTER XIX.

COMMISSIONERS OF THE CIRCUIT COURTS.

§ 464. **Circuit courts may appoint; powers and duties.**—The office of commissioner of the circuit court is quite an important one, as he has the authority in some cases to exercise functions which also belong to the highest judicial officers of the country.

We have already noticed that any district judge may appoint commissioners, before whom appraisers of vessels or goods and merchandise seized for breaches of any law of the United States may be sworn.[1] This seems to be the limit of their authority. But each circuit court can appoint, in the different districts in which it is held, as many discreet persons as it may deem necessary, to be called "commissioners of the circuit courts," who may exercise such powers as are or may be expressly conferred upon them.[2] But no marshal or deputy marshal of any of the courts of the United States is eligible to the office of commissioner of any of said courts.[3]

Under the provisions of the statutes the commissioners have various powers conferred upon them. They have equal authority with the judges of the Supreme Court and of the circuit and district courts to hold to security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States;[4] and they have power to enforce the awards or decrees of foreign consuls, vice-consuls or commercial agents, in cases where the latter lawfully sit as arbitrators of differences that arise between the captains and the crews of vessels belonging to the nation whose interests are committed to their charge.[5]

They may also hear the applications of poor convicts, to be relieved from imprisonment in certain cases, and determine the same;[6] and arrest foreign seamen upon the application of consular officers in certain cases.[7] They may also summon the master of a vessel to show cause why process should not issue against her to answer

[1] Rev. Stat. §§ 570, 938.
[2] Rev. Stat. § 627.
[3] Rev. Stat. § 628.
[4] Rev. Stat. § 727.
[5] Rev. Stat. § 728.
[6] Rev. Stat. §§ 1042, 5296.
[7] Rev. Stat. §§ 4080, 4081, 5280.

for the wages of seamen, upon a proper application therefor;[1] take depositions *de bene esse* in any civil cause depending in the circuit or district courts;[2] take bail affidavits when required in civil cases in said courts, and acknowledgments of the same;[3] administer oaths and take acknowledgments in certain cases, and certify the same;[4] and issue search warrants to search premises, where there is the proper evidence that a fraud is being perpetrated against the revenue.[5]

They have also further powers, which we will hereafter more particularly notice, such as to hear and determine the claim made for a fugitive from justice under an extradition treaty, but not until they are authorized so to do by some court of the United States. So the circuit court of each judicial circuit is required to appoint from the commissioners of each judicial district in each judicial circuit one to act as supervisor of elections for the district of which he is a commissioner, of whose duties as such supervisor we shall hereafter treat. Besides this, bonds and stipulations may be taken in admiralty before any commissioner in certain cases provided for by Rule 5 in admiralty.

The statute conferring the power of appointing commissioners makes no provision for their removal; but the practice is for the courts to remove as well as appoint. It has, however, been held that a commissioner is not an officer of the court, and that the court in making the appointment only exercises an agency imposed on it, and does not acquire thereby a right to supervise his proceedings as an officer.[6]

§ 465. **Power of commissioners to require security to keep the peace and for good behavior.**—Having referred in a general way to the powers of the commissioners of the circuit courts, it will be appropriate to consider these powers more particularly, and furnish forms for their convenience. In reference to the power of commissioners to hold to security to keep the peace and for good behavior the statute provides: "The judges of the Supreme Court and of the circuit and district courts, the commissioners of the circuit courts and the judges and other magistrates of the several states, who are or may be authorized by law to make arrests for offences against the

[1] Rev. Stat. §§ 4546, 4547.
[2] Rev. Stat. § 863.
[3] Rev. Stat. § 945.
[4] Rev. Stat. § 1778.
[5] Rev. Stat. § 3462.
[6] *Ex parte* John Van Orden, 3 Blatch. 166.

United States, shall have the like authority to hold to security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective states, in cases cognizable before them."[1]

Similar provisions are to be found in statutes of most if not all of the states, which is perhaps sufficient evidence of their importance and wisdom. They are particularly efficacious in restraining treasonable attempts against the government.[2] The commissioner has under these provisions the same power in respect to the taking of bail or security that a state magistrate would have in similar cases, and no more. Thus, where a commissioner, at the request of a prisoner, adjourned his examination for nineteen days, in a case where the latter was charged with a violation of the revenue laws, and took bail for his appearance at the end of that time, when the magistrate of the state could under such circumstances adjourn the case only ten days, in a suit against his sureties on the bond for a breach of it, it was held that the prisoner could not by consent confer the right to adjourn for that time, nor estop the sureties from setting up the invalidity of it.[3]

§ 466. **There must be an information or complaint.**—The general practice in the several states where cognizance is given the state courts or officers in such cases is followed in cases presented to commissioners and the federal judges. This must necessarily be by information or complaint under oath, or by a personal examination of the complaining party, and such others as may be produced, showing that some one threatens to commit or is about to commit some offence arising under the Constitution or laws of the United States. In such cases it must appear that there is at least probable cause to believe that the offence will be committed unless the party charged is restrained by the action of the magistrate; and it would not be proper for him to issue a warrant for the arrest on the mere motion of the commissioner or other officer.[4] For forms, see *post*, "Forms in proceedings before commissioners."

[1] Rev. Stat. § 727.

[2] United States *v.* Greiner, 4 Phila. 396.

[3] United States *v.* Case, 8 Blatch. 250; United States *v.* Rundlet, 2 Curt. 44; United States *v.* Horton's Securities, 2 Dill. 94; United States *v.* Goldstein, 1 Dill. 413.

[4] Johnson *v.* Tompkins, Bald. 571; United States *v.* Shepherd, 1 Abb. 431.

§ 467. **Proceedings on examination.**—The usual proceeding on examination of similar cases before state magistrates is followed when they are before federal magistrates. When the party charged is brought before him, the witnesses may be examined both on the part of the government and of the party accused. If from the evidence the magistrate believes that there is good reason to fear the commission of the offence by the accused, and that it arises under the Constitution and laws of the United States, he should be held to answer before the proper tribunal, and give a proper recognizance therefor, with sureties to be approved by the commissioner, and further that he will in the meantime keep the peace and be of good behavior toward all citizens of the United States, and particularly towards the one complaining in that behalf. For form for a recognizance, see *post*, No. 203.

§ 468. **Recognizance of witnesses.**—"Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offence against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance with or without sureties, in his discretion, for his appearance to testify in the case. And where the crime or offence is charged to have been committed upon the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused whose testimony in his opinion is important, and is in danger of being otherwise lost."[1]

A form for a recognizance may be found *post*, No. 205.

§ 469. **When the prisoner must be committed; duty of the commissioner to make a return.**—If a recognizance is required and given by the prisoner he should be discharged, but if not he should be committed to prison until he furnishes the same, and the mittimus or warrant of commitment should, as is usually required in such cases in proceedings before state officers, show the cause of the commitment and the amount of the security necessary for his discharge.

The proper form of the mittimus will be found *post*, No. 207.

[1] Rev. Stat. §§ 848, 879, 1014. In Vermont all recognizances for the appearance of witnesses in such cases must be to the next term of the circuit court to be held in the district: Rev. Stat. § 880.

It would be the duty of the commissioner to make a return of the recognizance if one is given, and of all the papers and process, to the proper court, where the prisoner is required to appear on or before the first day of the next term of the same.

§ 470. **Commissioners may enforce awards of consuls, etc., in certain cases.**—The statute provides for the enforcement of the awards or decrees of consuls and other agents of foreign countries. It is as follows: "The district and circuit courts and the commissioners of circuit courts shall have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration or decree of any consul, vice-consul or commercial agent of any foreign nation, made or rendered by virtue of any authority conferred upon him as such consul, vice-consul or commercial agent, to sit as judge or arbitrator in such differences as may arise between the captains and crews of vessels belonging to the nation whose interests are committed to his charge; application for the exercise of such power being first made to such court or commissioner by petition of such consul, vice-consul or commercial agent. And said courts and commissioners may issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration or decree, and to enforce obedience thereto by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States until such award, arbitration or decree is complied with, or the parties are otherwise discharged therefrom, by the consent in writing of such consul, vice-consul or commercial agent, or his successor in office, or by the authority of the foreign government appointing such consul, vice-consul or commercial agent; *provided, however*, that the expenses of the said imprisonment and maintenance of the prisoners and the cost of the proceedings shall be borne by such foreign government or by its consul, vice-consul or commercial agent requiring such imprisonment. The marshals of the United States shall serve all such process and do all other acts necessary and proper to carry into effect the premises under the authority of said courts and commissioners."[1]

The required forms for proceeding under this section may be found *post*, under the head of "Forms in proceedings before commissioners."

[1] Rev. Stat. § 728.

§ 471. **Offenders against the United States; when arrested by commissioners.**—Section 1014 provides: "For any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, the chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate of any state where he may be found, and *agreeably to the usual mode of process against such offenders in such state*, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offence. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offence is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."[1]

§ 472. **Usual mode of procedure against offenders in the state courts pursued.**—The words "usual mode of process against offenders," used in the statutes, are synonymous with usual mode of proceedings; and the mode of proceedings should in all cases conform to the usual practice and procedure in like cases in the courts of the state where the proceedings shall take place.[2] The authority granted to the judicial officer in these cases is not one which can be exercised in any arbitrary manner which he may see fit to prescribe or adopt, but it must be exercised in the same manner as that pursued against offenders in similar cases under the laws of the state where the prosecution is instituted.[3]

§ 473. **Information or complaint under oath.**—The mode of procedure in the state courts on preliminary examinations is generally, if not universally, prescribed by the statutes of the various states. There must be at least a probable cause to believe that an

[1] See also Rev. Stat. §§ 848, 879.

[2] United States *v.* Rundlett, 2 Curt. 41; United States *v.* Horton's Securities, 2 Dill. 94.

[3] Bagnall *v.* Ableman, 4 Wis. 163; United States *v.* Clark, 1 Gallis. 497; *In re* Robert M. Martin, 5 Blatch. 303.

offence has been committed against the United States, before the magistrate can properly issue a warrant for the arrest of an offender, and the requisite proof on which to base his conclusion must be an information or complaint, setting forth the necessary facts to constitute the offence charged, supported by oath.[1] But it is not necessary that the application for the warrant should be made by the district attorney. Any person may make the complaint under oath.[2] A warrant for the arrest should not, however, be issued upon the affidavit of a person who has no personal knowledge of the commission of the offence, and who only states that he has been informed of it, and believes the information to be true.[3]

It is not essential that the complaint be signed and verified before the commissioner, but it should be verified before some one authorized to administer oaths.[4] Nor need it follow the exact language of the statute in charging the offence.[5] This is in conformity with the current of decisions of the state courts upon the same point.

The form of the complaint should be that required by the statutes of the state for similar cases under state laws, if any, or, in the absence of this, such as may have been approved by the general practice in the state.[6]

For form, see *post*, No. 197.

The warrant of arrest, if issued, should, with the necessary subpœnas on behalf of the United States, be placed in the hands of the United States marshal of the proper district or his deputy, who should serve and return them in the usual manner provided by the state law.[7]

§ 474. **Notice to the district attorney.**—It is not imperatively required to give notice of such proceedings to the district attorney, but it is very proper to do so after the filing of the complaint, where it is convenient or practicable, as the government is the party in-

[1] United States *v.* Bollman, 1 Cr. (C. C.) 373.

[2] United States *v.* Skinner, 2 Wheel. Cr. Cas. 232.

[3] *In re* Commissioners, 3 Woods 502; United States *v.* Burr, 2 Wheel. Cr. Cas. 573.

[4] *Ex parte* Bollman, 4 Cr. 75; Burr's Trial 14.

[5] United States *v.* Hand, 6 McLean 274.

[6] United States *v.* Rundlett, 2 Curt. 41; United States *v.* Horton's Securities, 2 Dill. 94.

[7] Rev. Stat. §§ 787, 788. It is a common practice to insert the names of all the witnesses in one subpœna, and this is the most convenient way.

terested in the prosecution. If he appears it can be only as counsel for the government; and he cannot direct the commissioner what course he shall pursue or what finding he shall make, nor can he dismiss the proceedings.[1]

§ 475. **Preliminary hearing; witnesses.**—At the hearing of the cause the course of procedure would be the same as in a like case under the practice of the state, and similar to that suggested in case of a prosecution to require security to keep the peace and for good behavior.[2] The accused may be represented by counsel and examine witnesses in his own behalf;[3] but the magistrate cannot issue process to summon witnesses for him in another state.[4]

The statute provides that in no case shall the fees of more than four witnesses be taxed against the United States in the examination of a criminal case before a commissioner of a circuit court, unless their materiality and importance are first approved and certified to by the district attorney for the district in which the examination is had, and such taxation is subject to revision as in other cases.[5]

If the magistrate adjourns a cause to a future time it must be in accordance with the state law and practice on that subject, and it cannot be for an indefinite time.[6] If the statutes of the state provide for giving bail in such cases, bail may be taken for the appearance of the accused at the time fixed;[7] but if no bail is given he should be committed.

For form of recognizance in such cases, see *post*, No. 206.

The accused may be committed by the commissioner although the grand jury of the trial court in such cases is in session, and even although an indictment found against the accused for the offence charged has been quashed.[8] It may further be observed that whether the commissioner commits or discharges the accused it is not a final bar to further proceedings. If he is discharged he may be again

[1] United States *v.* Schumann, 2 Abb. (C. C.) 523. In some of the circuits there is a rule requiring notice to be given the district attorney in revenue cases: Rules 13 and 61, 8th circuit.

[2] See *ante*, § 468.

[3] United States *v.* Bollman, 1 Cr. (C. C.) 373.

[4] United States *v.* White, 2 Wash. 29. The power to hear implies the power to adjourn, both as to time and place: United States *v.* Rundlett, 2 Curt. 41.

[5] Rev. Stat. § 981.

[6] United States *v.* Worms, 4 Blatch. 332.

[7] United States *v.* Horton's Securities, 2 Dill. 94; United States *v.* Rundlett, 2 Curt. 41.

[8] United States *v.* Burr, 1 Burr's Trial 79; United States *v.* Townmaker, Hemp. 299; United States *v.* Smith, 2 Cr. (C. C.) 111.

arrested for the same offence, and may be held to bail or committed on sufficient evidence. If committed, as we shall hereafter more fully notice, he may apply to the proper court for a reduction of the bail fixed by the commissioner, or the prosecuting officer may apply to the court to have it increased, or even to discharge the prisoner altogether. The prisoner may also procure a discharge in a proper case on habeas corpus. The commissioner's order in such a case is not in the nature of a final judgment.[1]

§ 476. **Witness fees; how paid.**—Witnesses are allowed for each day's attendance in court or before any officer pursuant to law one dollar and fifty cents, and five cents a mile each way in going from his place of residence to the place of trial or examination and in returning to his place of residence. An affidavit of his attendance and a statement of his claim therefor should be made out and sworn to before the commissioner, who should certify to the attendance, and order the proper marshal of the district to pay the claim.[2]

For form of affidavit, certificate and order, see *post*, Nos. 208, 209.

§ 477. **Decision of the magistrate; commitment.**—If after hearing the evidence the commissioner believes that an offence against the United States has been committed, and that the accused is guilty thereof, he should so find, and by an order commit him to prison to await any indictment which may be found in the proper court against him, unless the offence is bailable and he furnish good and sufficient bail for his appearance at said court; and if he fails at the time of the decision to furnish a proper recognizance in such cases, in a sum to be fixed by the commissioner, the commissioner should issue a warrant of commitment.[3] We shall hereafter notice what causes are and what are not bailable before a commissioner.

For form of warrant for commitment, see *post*, No. 204.

§ 478. **Waiver of examination.**—The accused can of course appear before the commissioner at any time after complaint is filed and waive an examination, and give a recognizance the same as if

[1] United States *v.* Burr, 1 Burr's Trial 11, 79; *In re* Robert M. Martin, 5 Blatch. 303.

[2] Rev. Stat. § 848.

If a witness is detained in prison for want of security for his appearance, he is entitled to a compensation of one dollar a day: Rev. Stat. § 848. The marshal is required to pay witness, on behalf of the United States, on the order of the court: Rev. Stat. § 855.

[3] Anon., 1 Wool. 422; United States *v.* Bloomgart, 2 Ben. 356; *In re* Samuel R. Van Campen, 2 Ben. 419; *In re* Robert M. Martin, 5 Blatch. 303: United States *v.* Burr, 1 Burr's Trial 11.

he had been held to bail for his appearance after an examination. This is the practice in the state courts; and of course it could not be construed into any confession of guilt of the accused.

The warrant of commitment should in all cases show on its face a sufficient cause of commitment.[1] If it does not set forth an act that is made an offence against the United States it would be void,[2] and the prisoner discharged on habeas corpus.

§ 479. **Removal of prisoner to another district.**—The section under consideration provides that, where any offender is committed in any district other than that where the offence is to be tried, it is the duty of the judge of the district where such offender is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.[3] Under this provision a party who has committed an offence against the United States in the District of Columbia may be arrested and examined elsewhere, and, if held for trial, may be removed to said district for trial.[4] But it does not apply to an arrest made for the purpose of extradition to a foreign country.[5]

§ 480. **Significance of the word "seasonably."**—The accused is entitled to a reasonable opportunity to procure bail, and the statute does not authorize his removal under the last clause of the section until he has been imprisoned for the want of bail; that is, for his failure to enter into a recognizance for his appearance at the proper court. After this it is the duty of the judge of the district where the offender is imprisoned, and where he must be tried in another district, to *seasonably* issue his warrant for his removal to the district where the trial is to be had. "Nothing is to be done rashly or in haste or malice. A man is not to be snatched from his home on the instant, and carried into a distant state. But a season is to be allowed at least to procure bail if not to arrange for his departure, and this season is to be allowed after his arrest, examination, the fixing of the amount of bail, and imprisonment for delinquency in not giving it."[6]

[1] *Ex parte* Thomas Williams, 4 Cr. (C. C.) 343; *Ex parte* N. V. H. Bennett, 2 Id. 612; *Ex parte* Burford, 3 Cr. 448; *Ex parte* Robert Sprout, 1 Cr. (C. C.) 424; United States *v.* Brown, 4 Id. 333.

[2] Bagnall *v.* Ableman, 4 Wis. 163.

[3] See also § 879, as to the recognizance which may be required of witnesses: United States *v.* Haskins, 3 Saw. 262.

[4] *In re* Augustus C. Buel, 3 Dill. 116.

[5] *In re* Philip Henrich, 5 Blatch. 414.

[6] Bagnall *v.* Ableman, 4 Wis. 163.

The commissioner has the same power to take bail as a state magistrate in a similar case; and although the prisoner is in the hands of a marshal awaiting a warrant for his removal to another district from the district judge, it appears that the commissioner may still release him at any time before the issuing of the warrant, on his entering into a proper recognizance for his appearance as required by the order of the commissioner.[1]

§ 481. **Amount of bail; what the recognizance should contain.**—The word bail, in the statutes, means the taking of security for the appearance of the accused party at the proper court and at the proper time; and this must not be excessive. What would be large bail in one case would perhaps not be large in another. The judgment of the court or magistrate in fixing the amount of bail should be guided by a reasonable consideration of the ability of the prisoner to give bail and the atrocity of the offence; always bearing in mind that the object in requiring bail is to secure the personal attendance of the accused at the proper court, to answer to any indictment which may be found against him for the offence charged.[2]

The bail to be given is a recognizance or bond with sureties. This should recite the act or offence with which the principal is charged; and if from the recital of the act or offence charged it appears that it does not in fact show any offence against the United States, or any violation of an act of Congress, it is void and the sureties are not bound thereby. But it is sufficient if it sets forth an act punishable by a statute of the United States, although without any particulars.[3]

§ 482. **Extent of liability of sureties.**—A recognizance which requires the accused to appear in the proper court and attend from day to day to answer the charge made against him is not discharged by the quashing of an indictment which may be found against him; for another indictment may still be found during the term, for the same offence, and free from the objections to the former one; but if the court finally adjourns without taking any action against him on the charge, he and his sureties are discharged.[4]

[1] United States *v.* Horton, 2 Dill. 94; United States *v.* Voltz, 14 Blatch. 15.

[2] United States *v.* Lawrence, 4 Cr. (C. C.) 518; United States *v.* Case, 8 Blatch. 250; *Ex parte* George Milburn, 9 Pet. 704.

[3] United States *v.* Hand, 6 McLean 274; United States *v.* Dennis, 1 Bond 103.

[4] United States *v.* White, 5 Cr. (C. C.) 368; United States *v.* Burr, 1 Burr's Trial 79.

If the recognizance stipulates for the appearance of the accused at the next term of the proper trial court and at any subsequent term of said court to be thereafter held, this means only such subsequent term as may follow in regular succession in the course of business of the court, and an agreement at any term to continue the case for an indefinite period would discharge the sureties.[1] But if the accused, after giving the recognizance, should be arrested, convicted and imprisoned under the state laws, such proceeding and imprisonment would be no excuse for his non-appearance, nor exonerate the bail from their obligation to produce him; nor would the death of the accused after default and forfeiture of the recognizance relieve them from their liability.[2]

§ 483. **Copies of process to be returned to the proper court.**— Whenever a court of the United States in the district where the examination takes place, or in some other district, within or without the state, has by law cognizance of the offence charged, and for which the accused is held to bail or committed, it becomes the duty of the commissioner to return, as speedily as may be, copies of the *process*, together with the recognizances taken, to the clerk of the proper court.

The word *process*, as here used, undoubtedly means proceedings in the case until the determination of it by the order or judgment of the magistrate. This, then, would embrace the information or complaint, with its verification, and a statement of the proceedings before the commissioner and his action thereon, and the recognizance of the accused or the warrant of commitment, as the case may be, and the original recognizances of the witnesses for their appearance to testify in the case. These should be duly certified by the commissioner

The mode and scope of the return in such cases has been the subject of regulation by rule of some of the circuit courts, perhaps most of them.

§ 484. **Provisions for the discharge of poor convicts.**—Provision is made by the Revised Statutes for the discharge from prison of

[1] Reese *v.* United States, 9 Wall. 13.

[2] United States *v.* Van Fossen, 1 Dill. 406. Bail, in cases where the punishment may be death, cannot be taken by a commissioner: Rev. Stat. § 1016. A party accused and admitted to bail may be arrested by his bail at any time and delivered to the marshal or his deputy, before the commissioner, and be exonerated: Rev. Stat. § 1018. So better security may be required: Id. § 1019.

poor convicts who have been sentenced to pay a fine, or fine and costs. Section 1042 provides as follows: "When a poor convict, sentenced by any court of the United States to pay a fine, or fine and costs, whether with or without imprisonment, has been confined in prison thirty days, solely for the non-payment of such fine, or fine and costs, he may make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and costs, and after notice to the district attorney of the United States, who may appear, offer evidence and be heard, the commissioner shall proceed to hear and determine the matter, and if on examination it shall appear to him that such convict is unable to pay such fine, or fine and costs, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: 'I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil precept for debt by the laws of (state where the oath is administered); and that I have no property in any way covered or concealed, or in any way disposed of, for future use and benefit. So help me God.' And thereupon such convict shall be discharged, the commissioner giving to the jailer or keeper of the jail a certificate setting forth the facts."[1]

In construing this section it has been held that a poor convict is entitled to be released under its provisions, although he has been given a pardon on condition that he pay a fine and costs.[2]

§ 485. **Commissioner's power to arrest foreign seamen, in case of controversies, etc., at sea.**—Section 4079 of the Revised Statutes provides that "whenever it is stipulated by treaty or convention between the United States and any foreign nation that the consul-general, consuls, vice-consuls or consular or commercial agents of each nation shall have exclusive jurisdiction of controversies, difficulties or disorders arising at sea or in the waters or ports of other nations, between the master or officers and any of the crew, or between any of the crew themselves, of any vessel belonging to the

[1] See also §§ 847, 5296.

[2] *In re* Manual Ruhl, 5 Saw. 186.

nation represented by such consular officer, such stipulations shall be executed and enforced within the jurisdiction of the United States as hereinafter declared. But before this section shall take effect as to the vessels of any particular nation having such treaty with the United States, the President shall be satisfied that similar provisions have been made for the execution of such treaty by the other contracting party, and shall issue his proclamation to that effect, declaring this section to be in force as to such nation."

Section 4080 provides: "In all cases within the purview of the preceding section, the consul-general, consul or other consular or commercial authority of such foreign nation, charged with the appropriate duty in the particular case, may make application to any court of record of the United States, or to any judge thereof, or to any *commissioner of a circuit court*, setting forth that such controversy, difficulty or disorder has arisen, briefly stating the nature thereof and when and where the same occurred, and exhibiting a certified copy, extract of the shipping articles, roll or other proper paper of the vessel, to the effect that the person in question is of the crew or ship's company of said vessel; and further stating and certifying that such person has withdrawn himself, or is believed to be about to withdraw himself, from the control and discipline of the master and officers of the vessel, or that he has refused, or is about to refuse, to submit to and obey the lawful jurisdiction of consular or commercial authority in the premises; and further stating and certifying that, to the best of the knowledge and belief of the officer certifying, such person is not a citizen of the United States. Thereupon such court, judge or commissioner shall issue his warrant for the arrest of the person so complained of, directed to the marshal of the United States for the appropriate district, or in his discretion to any person, being a citizen of the United States, whom he may specially depute for the purpose, requiring the person to be brought before him for examination at a certain time and place."

Section 4081 provides: "If on such examination it is made to appear that the person so arrested is a citizen of the United States, he shall be forthwith discharged from arrest and shall be left to the ordinary course of law. But if this is not made to appear, and such court, judge or commissioner finds, upon the papers heretofore referred to, a sufficient *primâ facie* case that the matter concerns

only the internal order and discipline of such foreign vessel, or, whether in its nature civil or criminal, does not affect directly the execution of the laws of the United States, or the rights and duties of any citizen of the United States, he shall forthwith, by his warrant, commit such person to prison, where prisoners under sentence of a court of the United States may be lawfully committed, or, in his discretion, to the master or chief officer of such foreign vessel, to be subject to the lawful orders, control and discipline of such master or chief officer, and to the jurisdiction of the consular or commercial authority of the nation to which such vessel belongs, to the exclusion of any authority or jurisdiction in the premises of the United States or of any state thereof. No person shall be detained more than two months after his arrest, but at the end of that time shall be set at liberty, and shall not again be arrested for the same cause. The expenses of the arrest and detention of the person so arrested shall be paid by the consular officers making the application."

For forms required under the provisions of the foregoing section, the forms furnished in connection with the treatment of other powers and duties of commissioners may be consulted. The application, warrant of arrest and warrant of commitment are all similar in their formal parts.

§ 486. **Commissioners' authority in certain cases to arrest deserting foreign seamen.**—Authority is conferred upon commissioners of the circuit courts, as well as other officers, in certain cases to arrest seamen deserting from foreign vessels.

Section 5280 of the Revised Statutes provides as follows: "On application of a consul or vice-consul of any foreign government having a treaty with the United States, stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any circuit, justice or other magistrate having competent power to issue warrants to cause such person to be arrested for examination. If on examination the facts stated are found to be true, the person arrested, not being a citizen of the United States, shall be delivered up to the consul or vice-consul,

to be sent back to the dominions of any such government. No person so arrested shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause. If any such deserter shall be found to have committed any crime or offence, his surrender may be delayed until the tribunal before which the case shall be depending or may be cognizable shall have pronounced its sentence, and such sentence shall have been carried into effect."[1]

For appropriate forms required under this section, consult similar forms given for use in other cases.

§ 487. **Commissioners may summon masters of vessels in certain cases, for non-payment of wages.**—The statutes provide that whenever the wages of any merchant seaman are not paid within ten days after the time when the same ought to be paid, or any dispute arises between the master of a vessel and the seamen of the same touching wages, the district judge of the judicial district where the vessel is, or in case his residence be more than three miles from the place, or he be absent from the place of his residence, then any judge or justice of the peace, or any commissioner of a circuit court, may summon the master of such vessel to appear before him, to show cause why process should not be issued against such vessel, her tackle, apparel and furniture, according to the course of admiralty courts, to answer for the wages.[2]

It follows from the foregoing that some written application should be made by the party or parties seeking the recovery of wages, who should set forth therein the facts and circumstances which would give the commissioner jurisdiction of the case, including either the absence of the district judge from the place of his residence, if he resides where the vessel is, or if he resides more than three miles from that place, that fact should appear to give the commissioner jurisdiction. The application should be signed by the applicant and sworn to before the commissioner or other person authorized to administer oaths.[3]

[1] See also Rev. Stat. §§ 4079, 4081.

[2] Rev. Stat. § 4546.

[3] For construction of this provision and the following section, see Steamboat Thomas Jefferson, 10 Wh. 428; The Cypress, Blatch. & H. 83; Freeman *v.* Baker, Blatch. & H. 372; The Schooner David Faust, 1 Ben. 183; Whitman *v.* The Ship Neptune, 1 Pet. Ad. 183; Collins *v.* Nickerson, Sprague 126; Kief & Lang *v.* The Steamboat London, Newb. 6; The Schooner Eagle, Ole. 232.

The summons may be in the usual form. If the master against whom the summons is issued neglects to appear, or if appearing he does not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute is not forthwith settled, it is the duty of the commissioner to forthwith certify to the clerk of the district court that there is sufficient cause of complaint whereon to found admiralty process; and thereupon it becomes the duty of the clerk of such court to issue process against the vessel, and the suit will proceed in the court and a final judgment be given according to the usual course of admiralty practice in such cases.[1]

If the master makes a defence to the application the magistrate is required to hear it. He may make and verify, under oath, statements in opposition to the claims and demands of the seamen; and the commissioner may, for good cause shown, adjourn the cause for a reasonable time. But it is not expected that a commissioner will enter into any very critical or protracted examination of such cases, nor is he required to decide difficult questions.[2] It seems that his certificate should show that either the district judge was absent or resided more than three miles from the vessel.[3]

For form, see *post*, "Forms in proceedings before commissioners."

§ 488. **Commissioners; appointment and powers under statutes relating to equal civil rights.**—Chapter 7 of Title 70 of the Revised Statutes makes provision for securing the elective franchise and civil rights to citizens. The more effectually to secure these rights and to punish offenders, and those guilty of violating the rights of persons secured by these provisions, section 1982 of the Revised Statutes provides that the district attorneys, marshals and deputy marshals, the commissioners appointed by the circuit and territorial courts, are authorized and required, at the expense of the United States, to institute prosecutions against all persons violating any of the provisions of said chapter, and to cause such persons to be prosecuted.[4]

Another section further provides that the circuit courts of the United States and the district courts of the territories, from time to time, shall increase the number of commissioners so as to afford a speedy and convenient means for the arrest and examination of per-

[1] Rev. Stat. § 4547.

[2] 5 Conk. Ad., Pr. 56. See also Oliver *v.* Alexander, 6 Pet. 143; The Trial, Blatch. & H. 94.

[3] The Steamboat London, Newb. 6.

[4] Rev. Stat. Tit. 24, p. 347, §§ 1977 to 1991, inclusive.

sons charged with the crimes above referred to; and they are authorized and required to exercise all the powers conferred in reference thereto in the same manner as they are authorized to exercise them in reference to other offences against the laws of the United States.[1]

They are further authorized to appoint in writing one or more suitable persons, from time to time, to execute all such warrants or other process as the commissioners may issue in the lawful performance of their duties, and have power to call to their aid the bystanders or *posse comitatus* of the proper county, or so much of the land or naval force of the United States or of the militia as may be necessary to the performance of the duty with which they are charged.[2]

§ 489. **Bail and affidavits in civil causes may be taken by commissioners, and stipulations in admiralty.**—Section 945 provides that bail and affidavits, when required in any civil cause in any circuit or district court, may be taken by a commissioner of the circuit court for the district; and such acknowledgments of bail and affidavits have the same effect as if taken before any judge of such courts.[3] Rule 5 in admiralty also provides that bonds or stipulations in admiralty suits may be given and taken before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or any commissioner of the United States authorized by law to take bail and affidavits in civil cases.[4]

§ 490. **Commissioners may take depositions de bene esse.**—The testimony of any witness may be taken in any civil cause depending in any district or circuit court by deposition *de bene esse* before any commissioner of a circuit court when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than

[1] Rev. Stat. § 1983.

[2] Rev. Stat. § 1984. See also Rev. Stat. § 5516. Section 1987 provides for an allowance of fees by the commissioners to persons executing process.

[3] A commission has authority under this provision to take affidavits to papers in civil proceedings for the arrest of a debtor in conformity with state laws: Fulton *v.* Gilmore, 10 C. L. N. 108.

[4] But he cannot authenticate a bond or stipulation in admiralty by reciting that the sureties appeared before him and bound themselves, etc., when in fact they never signed the obligation: Sawyer *v.* Oakman, 11 Blatch. 65.

one hundred miles from the place of trial before the time of trial, or when he is ancient and infirm.[1] The conditions which must exist in order to authorize the taking of the deposition *de bene esse* are: 1st, that the witness lives at a greater distance from the place of trial than one hundred miles; 2d, or that he is bound on a voyage to sea; 3d, or about to go out of the United States; 4th, or about to go out of such district to a greater distance from the place of trial than one hundred miles before the time of trial; 5th, or is ancient and infirm.[2]

The taking of depositions *de bene esse* is in derogation of the rules of common law, and therefore the statutory provisions authorizing it are strictly construed. Hence, before such depositions can be used it is necessary to show that the statutory provisions have been strictly complied with.[3] If one deposition has been taken, yet another may be taken of the same witness;[4] and they may be taken outside the limits of the district as well as within the district where the trial is had.[5] But the mere fact that a witness is about to depart from the state, or liable to be ordered out of the reach of a subpœna, is no reason for taking his deposition *de bene esse*.[6]

§ 491. **Reasonable notice must be given.**—The statute further provides that reasonable notice must be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, which notice must state the name of the witness and the time and place of the taking of his deposition. In cases *in rem* the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and shall direct.[7]

[1] Rev. Stat. § 863.

[2] Harris *v.* Wall, 7 How. 693; Whitney *v.* Hunt, 5 Cr. (C. C.) 120. The statute does not apply to cases pending in the Supreme Court: The Ægo, 2 Wh. 287; The London Packet, 2 Wh. 371.

[3] Bell *v.* Morrison, 1 Pet. 351; Harris *v.* Wall, 7 How. 693; Evans *v.* Eaton, 7 Wh. 356.

[4] Cornell *v.* Williams, 20 Wall. 226.

[5] Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604.

[6] The Samuel, 1 Wh. 9; Harris *v.* Wall, 7 How. 693.

[7] Rev. Stat. § 863.

The service of the notice, whether on the party or his attorney, should be personal, and a service by leaving a copy at his dwelling-house or usual place of business is not authorized.[1]

§ 492. **A party may waive his rights.**—Although as a general rule the statute providing for the taking of depositions must be strictly pursued, yet if there should be a failure so to do, a party for whose benefit the provisions were intended may waive his right to the same. Thus, if he should appear and cross-examine witnesses at the taking of depositions, or should consent that depositions might be taken at a certain time and place, this would be a waiver of the notice required by the provisions of the statute, and he could not object to the depositions thus taken without a formal notice.[2]

The notice should contain the title of the cause and the name or names of the witnesses proposed to be examined;[3] and if a deposition should be taken without the required notice, it may be taken again on the required notice.[4]

§ 493. **Mode of taking depositions de bene esse.**—The statute further provides as to the mode of taking depositions *de bene esse*, that the person deposing shall be cautioned and sworn to testify the whole truth, and be carefully examined; that his testimony shall be reduced to writing by the magistrate taking the deposition, or by himself in the magistrate's presence, and by no other person; and that it shall after it has been reduced to writing be subscribed by the deponent.[5]

The witness should be sworn to tell the whole truth as far as he knows it respecting the matter in controversy;[6] and if he is properly sworn it is not necessary that he should be otherwise cautioned.[7] If there is a statutory form of oath at the place where the deposition is taken, that may be followed; but if the witness has scruples against the usual form of oath, he may take that form which he re-

[1] Carrington *v.* Stimpson, 1 Curt. 437. If the notice is not reasonable the deposition cannot be read; but an hour's notice may be sufficient: Jameson *v.* Willis, 1 Cr. (C. C.) 566; Leiper *v.* Bickley, Id. 29; Bowie *v.* Talbot, Id. 247.

[2] Shutte *v.* Thompson, 15 Wall. 151; York Company *v.* Central Railroad Co., 3 Wall. 113; United States *v.* One Case of Hair Pins, 1 Paine 400; Sage *v.* Tauszky, 6 Cent. L. J. 7.

[3] Claxton *v.* Adams, 1 McArthur 496; Carrington *v.* Stimpson, 1 Curt. 437.

[4] Goodhue *v.* Bartlett, 5 McLean 186.

[5] Rev. Stat. § 864.

[6] Wilson Sew. Mach. Co. *v.* Jackson, 1 Hugh. 295; Shutte *v.* Thompson, 15 Wall. 151; United States *v.* Smith, 4 Day 121; Garrett *v.* Woodward, 2 Cr. (C. C.) 190.

[7] Moore *v.* Nelson, 3 McLean 383; Brown *v.* Platt, 2 Cr. (C. C.) 253.

gards as binding on his conscience, which the commissioner can duly certify.[1]

§ 494. **Transmission of depositions to the court.**—The statute further provides for the transmission of the deposition to the proper court. The magistrate taking it is required to retain it until he shall deliver it with his own hand into the court for which it is taken, or until it shall be sealed up by him and directed to such court; and it must remain under his seal until opened in court.[2]

§ 495. **What must appear before the deposition can be used.**—Unless it appears to the satisfaction of the court at the time it is proposed to use the deposition that the witness is dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity or imprisonment he is unable to travel and appear at court, such deposition cannot be used in the cause.[3]

§ 496. **The deposition must be reduced to writing by the commissioner or the witness.**—A deposition cannot be read in evidence unless it be shown that it was reduced to writing by the commissioner himself, or by the witness in his presence.[4] It would be good, however, if the commissioner should certify that it was reduced to writing by himself and the witness in his presence.[5] But the magistrate cannot authorize any one but the witness to reduce the testimony to writing;[6] it must be signed by the witness, or it cannot be read in evidence.[7] Each interrogatory should be at least substantially answered, otherwise it may be fatal to the deposition;[8] and the same rule prevails which governs on the oral examination of a witness on a trial, in reference to compelling the answer of witnesses.[9]

§ 497. **Certificate of the commissioner to deposition.**—The commissioner or other magistrate should attach to the deposition his certificate of the reasons for taking it, and the notice, if any, given to the adverse party.

[1] Wilson Sewing Machine Co. *v.* Jackson, 1 Hugh. 295.
[2] Rev. Stat. § 865.
[3] Id.
[4] Cook *v.* Burnley, 11 Wall. 659; Bell *v.* Morrison, 1 Pet. 351.
[5] Bussard *v.* Catalino, 2 Cr. (C. C.) 421.
[6] Marston *v.* McRea, Hemp. 689.
[7] Thorpe *v.* Simmons, 2 Cr. (C. C.) 195.
[8] Hurst *v.* McNeil, 1 Wash. (C. C.) 70; Winthrop *v.* Ins. Co., 2 Id. 7; Dodge *v.* Israel, 4 Id. 323.
[9] *In re* Judson, 3 Blatch. 148.

The certificate will be *prima facie* evidence of the official character of the magistrate, if accompanied by the usual authentication of such papers before him. The facts calling for the exercise of the authority should appear upon the face of the instrument, and not be left to parol proof.

The return should show that he administered the oath to the witness, and where the deposition was taken, so that it may appear that the direction of the commissioner was complied with, and that it was taken in conformity with the notice given, if any; and that the witness lived more than one hundred miles from the place of trial, or some other ground for taking the deposition ; and that he or the witness reduced the testimony to writing, and if the latter, that it was done in his presence; and any paper or document given in evidence or annexed to the deposition as a part of the testimony should be duly authenticated.[1]

The certificate of the officer who took the deposition that the witness lived more than one hundred miles from the place of trial is *prima facie* evidence of that fact.[2] But the reasons for the taking of the deposition may be contained in the testimony of the witness, as all the grounds for taking the same might well be presumed to be known to him. He would be likely to know if he lived over one hundred miles from the place of trial, or if not, his residence being fixed the court might take judicial notice of the fact. So he would know whether or not he was bound on a voyage at sea, or about to go out of the United States, or out of the district to a greater distance than one hundred miles from the place of trial, and of his age and the extent of his infirmity. His evidence in relation to these matters ought to be considered of a higher character than the mere certificate of the magistrate, and more than *prima facie* evidence. Such testimony being returned as a part of the deposition, with the proper certificate of the magistrate as to other matters, ought to be satisfactory of the right of the party seeking the deposition to have the same taken, and of the right to have the same read in evidence, provided at the time of trial the witness is dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the

[1] Harris *v.* Wall, 5 How. 693; Rhoads *v.* Selin, 4 Wash. (C. C.) 715; Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604; Bell *v.* Morrison, 1 Pet. 356.

[2] Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604; Merrill *v.* Dawson, 11 How. 375; Tooker *v.* Thompson, 3 McLean 92.

court is sitting, or that by reason of age, sickness, bodily infirmity or imprisonment, he is unable to travel or appear at court. But it has been held that if the officer who takes the deposition does not in his certificate assign any reason for taking it, the deposition will be suppressed.[1]

§ 498. **What must be shown on the trial to warrant the reading of a deposition.**—The statute expressly provides that no deposition de bene esse shall be read in evidence on the trial of a cause unless it is shown—

1. That the witness is dead;

2. Or gone out of the United States;

3. Or to a greater distance than one hundred miles from the place where the court is sitting;

4. Or that, by reason of age, sickness, bodily infirmity or imprisonment, he is unable to travel and appear at court.[2]

If at the time the deposition is taken he lives more than one hundred miles from the place of trial, but before the trial occurs he moves to a place less than that distance from the place of trial, his personal attendance would be required, unless other ground exists for reading the deposition, such as residence without the United States, or age, sickness or bodily infirmity unfitting him for travel or attendance upon the court.[3]

For forms required in taking depositions de bene esse, see *post*, "Forms in proceedings before commissioners."

§ 499. **Compelling witnesses to appear and testify.**—The statute provides that witnesses duly summoned to appear before the magistrate may be compelled to appear and testify.

This compulsory power exists in the court of the district in which the examination is taken. The power to compel is by the means and instrumentalities in force in the courts of the state for compelling the attendance and the testimony of witnesses. These include the process of *subpœna duces tecum*, the *subpœna ad testificandum*, the writ of *habeas corpus testificandum*, and the writ of attachment.

[1] Shutte *v.* Thompson, 15 Wall. 151; Woodward *v.* Hull, 2 Cr. (C. C.) 235; Sage *v.* Tauszky, 6 Cent. L. J. 7; Jones *v.* Knowles, 1 Cr. (C. C.) 523; Dunkle *v.* Worcester, 5 Biss. 102.

[2] Harris *v.* Wall, 7 How. 693; The Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604; The Samuel, 1 Wh. 9; Weed *v.* Kellogg, 6 McLean 44; Bowie *v.* Talbot, 1 Cr. (C. C.) 247.

[3] Stein *v.* Bowman, 13 Pet. 209; Bamet *v.* Day, 3 Wash. (C. C.) 243; Pettibone *v.* Derringer, 4 Wash. (C. C.) 243.

These writs must issue from a court of the district, on a proper application therefor.[1]

The application for compulsory process should show that the case is one in which a *de bene esse* examination is proper; that the commissioner has jurisdiction of the matter; and other facts authorizing the issuing of process against the witness,[2] and especially, if an attachment is asked, the party asking for it should file affidavits showing that the witness has been guilty of a contempt.[3]

§ 500. **Commissioners may take oaths and acknowledgments in certain cases; also depositions in admiralty under Rule 49.**—Section 1878 of the Revised Statutes provides: "In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any state or territory or in the District of Columbia, they may hereafter be also taken or made by or before any notary public duly appointed in any state, district or territory, or any of the commissioners of the circuit court, and when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace."

They may also take further proof on appeal of admiralty cases in the circuit court, by deposition, upon oral examination and cross-examination, or, when ordered by the court and a commission issues, upon written interrogatories and cross-interrogatories. In the former case notice must be given as provided by the general rule, the time of which may be extended or diminished by the court.[4]

§ 501. **Commissioners may issue search warrants in certain cases.**—The several judges of the circuit and district courts, and commissioners of the circuit courts, may within their respective jurisdictions issue a search warrant authorizing any internal revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that fraud upon the revenue has been or is being committed upon or by the use of said premises.[5]

For form of affidavit and search warrant in such cases, see *post*, "Forms in proceedings before commissioners."

[1] *Ex parte* Wm. S. Humphreys, 2 Blatch. 228; United States *v.* Tilden, 25 I. R. R. 352.

[2] *Ex parte* Elisha Peck, 3 Blatch. 113.

[3] *Ex parte* Wm. Judson, 3 Blatch. 148.

[4] Admiralty Rule 49.

[5] Rev. Stat. § 3462.

§ 502. **Commissioners may issue warrants for the arrest of fugitives for extradition.**—In reference to the arrest and extradition of fugitives from justice the statute provides: "Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath charging any person found within the limits of any state, district or territory with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If on such hearing he deems the evidence sufficient to sustain the charge, under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."[1] The statute further provides: "In every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants or other papers offered in evidence shall be received for the purpose of such hearing if they shall be properly and legally authenticated, so as to entitle them to be received as evidence of the criminality of the person so apprehended by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants or other papers shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any such deposition, warrant or other paper, or copy thereof, is authenticated in the manner required by this section."[2]

[1] Rev. Stat. § 5270.

[2] Rev. Stat. § 5271.

So far as the duty of a commissioner, in connection with the extradition of foreign criminals, is concerned, it is indicated by the two foregoing sections of the Revised Statutes. It has been suggested that the better course would be to first make a demand for the fugitive, after ascertaining his residence within the United States from the executive department of the government, and to secure a mandate from the President, before the judiciary is called upon to act;[1] but such a course of practice is not imperative.[2]

§ 503. **There must be a complaint under oath.**—The statute requires in such cases a complaint under oath, charging some person within the limits of the state with having committed some crime in a foreign country, between which and the United States there is a treaty or convention for extradition. The complaint should set forth these facts, and particularly the offence charged or the material features of it, so that the magistrate may determine whether the offence is among those enumerated in the treaty or convention of extradition;[3] and the complaint should recite the treaty and the appointment of the commissioner by some circuit court of the United States.[4]

For form of complaint, see *post*, "Forms in proceedings before commissioners."

§ 504. **What the warrant of arrest should contain.**—The warrant for the arrest of an alleged fugitive from justice should, in extradition cases, show on its face that the commissioner issuing it was duly authorized to do so; and it should also recite the treaty under which the extradition is requested.[5]

For form of warrant of arrest, see *post*, "Forms in proceedings before commissioners."

§ 505. **What the magistrate must certify.**—Under the provisions of the statute it is also the duty of the commissioner or other acting magistrate to certify the proceedings before him, together with a copy of all the evidence, to the Secretary of State, if he deems the evidence sufficient to sustain the charge under the proper treaty or convention.

Under this provision it would be necessary for the commissioner or other magistrate to take down in writing all the oral testimony

[1] *In re* Kaine, 3 Blatch. 9.

[2] *In re* McDonnell, 11 Blatch. 79; 6 Opinions of A. G. 91.

[3] *In re* Heinrich, 5 Blatch. 425; *In re* Kaine, 3 Blatch. 9.

[4] *In re* McDonnell, 11 Blatch. 79.

[5] *In re* Farey, 7 Blatch. 34; *In re* McDonnell, 11 Blatch. 79.

offered before him in a narrative form, and to preserve a record of all the objections made to the admissibility of evidence, whether oral or documentary, and his rulings thereon; and it would be advisable to read over the evidence given by each witness to him, and to have him sign the same.[1] Although the original documents in such cases may be in a foreign language, the parties seeking the extradition of the fugitive should furnish an accurate translation of the same by some competent witness, with the affidavit of the translator to the accurate translation thereof, before they can be received in evidence.

There is another reason for requiring the commissioner to keep an accurate record of the proceedings, complaint, testimony, documents, etc., and that is, to enable the proper court to review the proceedings and finding on habeas corpus or certiorari on a proper application therefor.[2]

For form of certificate, see *post*, "Forms in proceedings before commissioners."

§ 506. **Commissioners' fees; accounts; vouchers.**—The following fees, and no other compensation, will be taxed and allowed to commissioners, except in cases otherwise provided by law:

1. For administering an oath, ten cents.

2. For taking an acknowledgment, twenty-five cents.

3. For hearing and deciding on criminal charges, five dollars a day for the time necessarily employed.

4. For attending to a reference in a litigated matter, in a civil cause at law, in equity or in admiralty, in pursuance of an order of the court, three dollars a day.

5. For taking and certifying depositions to file, twenty cents for each folio.[3]

6. For each copy of the same furnished to a party on request, ten cents for each folio.

[1] *In re* Heinrich, 5 Blatch. 303.

[2] *In re* McDonnell, 11 Blatch. 79. See also for suggestions as to proper practice and expositions of the statutes on this subject, The British Prisoners, 1 Wood & M. 66; *In re* Joseph Steep, 11 Blatch. 124; *In re* Thomas, 12 Blatch. 370; *In re* Giacomo, 12 Id. 390; United States *v.* Lawrence, 13 Id. 295; *In re* Kaine, 14 How. 103; Case of Jose Ferreirados Santos, 2 Brock. 493; United States *v.* Davis, 2 Sum. 92; *In re* Francois Farez, 7 Blatch. 345.

[3] Folio, in this connection, means one hundred words, counting each figure as a word. Where there are over fifty and less than one hundred words, they must be counted as one folio: but a less number than fifty words cannot be counted, except when the whole statute, notice or order contains less than fifty words: Rev. Stat. § 854.

7. For issuing any warrant or writ, and for any other services, the same compensation as is allowed to clerks for like services.[1]

8. For issuing any warrant under the tenth article of the treaty of August 9, 1842, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any person charged with any crime or offence set forth in said article, two dollars.

9. For issuing any warrant under the provisions of the convention for the surrender of criminals, between the United States and the King of the French, concluded at Washington, November 9, 1843, two dollars.

10. For hearing and deciding upon the case of any person charged with any crime or offence, and arrested under the provisions of said treaty or of said convention, five dollars a day for the time necessarily employed.

11. For the examination and certificate in cases of applications of poor convicts imprisoned for non-payment of a fine or fine and costs, five dollars a day for the time necessarily employed.[2]

§ 507. **Fees as chief supervisor of elections.**—We have heretofore stated that one of the commissioners of the circuit court of the district may be named and appointed by the circuit court of the district as chief supervisor of elections of the judicial district of which he is a commissioner.

For his compensation in such cases he is allowed and paid as follows:

1. For filing and caring for every return, report, record, document or other paper required to be filed by him under any of the provisions of sections 2025, 2026 and 2027 of the Revised Statutes, ten cents.

2. For affixing a seal to any paper, record, report or instrument, twenty-five cents.

3. For entering and indexing the records of his office, fifteen cents per folio.

4. For arranging and transmitting to Congress, as provided for by law, any report, statement, record, return or examination, for each folio, fifteen cents; and for any copy thereof, or of any paper on file, a like sum.

[1] For fees of clerks, see *post*, ch. xxiii.

[2] Rev. Stat. § 847.

§ 508. **How to obtain an allowance and payment of commissioners' fees.**—United States commissioners must forward their accounts, duly verified by oath, to the district attorneys of their respective districts, by whom they should be submitted for approval in open court, and in the presence of the district attorney or his sworn assistant, whose presence is required to be noted on the record, and prove in open court, to the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts, that the services therein charged have been actually and necessarily performed as therein stated; and the court must thereupon cause to be entered of record an order approving or disapproving the account, as may be according to law and just. But the accounts thus approved or disapproved are still subject to revision by the accounting officers of the treasury.[1]

§ 509. **The accounts of commissioners and other ministerial officers subject to revision by the accounting officers of the Treasury Department.**—Section 846 of the Revised Statutes provides: "The accounts of district attorneys, clerks, marshals and commissioners of the circuit courts shall be examined and certified by the district judge of the district for which they are appointed, before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts."

It will be manifest from the foregoing provisions that the certificate of the judge is merely *prima facie* evidence of the correctness of the account, and the accounting officers of the Treasury Department may reject the whole or any item or items of the account.[2]

For form of account, see *post*, "Forms in proceedings before commissioners."

§ 510. **The practice and procedure on preliminary examinations before commissioners applicable generally.**—The statute provides not only for the arrest and preliminary examination of offenders against the United States by a commissioner of a circuit court, but "by any chancellor, judge of the supreme or inferior court, chief or first judge of common pleas, mayor of a city, justice of the

[1] Act Feb. 22, 1875; 18 Stat. L., C. 95, § 1.

[2] United States *v.* Smith, 1 W. & M. 184; United States *v.* Ingersoll, Crabbe 135.

peace or other magistrate of any state where he may be found, and agreeable to the usual mode of process against offenders in such state." The general mode of procedure which we have indicated in this chapter, for commissioners of the circuit courts, would be equally applicable to other magistrates in similar cases.

CHAPTER XX.

PROCEDURE IN CRIMINAL CASES.

§ 511. **Practice in criminal cases.**—We have in the preceding chapter pointed out the practice and procedure in certain cases where the offenders against the United States may be brought before circuit court commissioners and other magistrates designated for this purpose, for a preliminary examination into the charges preferred against them, under section 1014 of the Revised Statutes, which authorizes an arrest, examination and discharge or imprisonment or bail of such offenders by such magistrates, as the case may require, for their appearance for trial before such court of the United States as by law has cognizance of the offence; and we now proceed to consider the practice and procedure in such courts in criminal cases.[1]

§ 512. **Provisions of the statutes for criminal procedure.**—The statutes of the United States provide:

INDICTMENTS.—*Sec.* 1021. No indictment shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors.

OFFENCES AGAINST THE ELECTIVE FRANCHISE.—*Sec.* 1022. All crimes and offences committed against the provisions of chapter 7, title "Crimes," which are not infamous, may be prosecuted either by indictment or by information filed by a district attorney.

PERJURY BEFORE A COURT-MARTIAL.—*Sec.* 1023. In prosecutions for perjury committed on examination before a naval general court-martial, or for the subornation thereof, it shall be sufficient to set forth the offence charged on the defendant, without setting forth the

[1] We have already considered the jurisdiction of the circuit and district courts in such cases; see *ante*, §§ 35, 138, 139, 140, 141, 142. It may be observed that, although bail cannot be taken by a circuit court commissioner, or the magistrates provided by section 1014 of the Revised Statutes, where the punishment may be death, but in such cases it may be taken by the Supreme Court of the United States, or a circuit court, or by a justice of the Supreme Court, a circuit judge or a judge of a district court, who may exercise their discretion therein, having regard to the nature and circumstances of the offence, and of the evidence and the usages of the law: Rev. Stat. § 1016; United States *v.* Burr, Burr's Trial 310; United States *v.* Hamilton, 3 Dall. 17.

authority by which the court was held, or the particular matters brought before, or intended to be brought before, said court.

CHARGES JOINED IN ONE INDICTMENT.—*Sec.* 1024. When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated.

INDICTMENTS; DEFECTS OF FORM.—*Sec.* 1025. No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

JUDGMENT ON DEMURRER TO AN INDICTMENT.—*Sec.* 1026. In every case in any court of the United States where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be respondeat ouster; and thereupon a trial may be ordered at the same term, or a continuance may be ordered, as justice may require.

SEVERAL INDICTMENTS AGAINST THE SAME PERSON; ONE WRIT SUFFICIENT.—*Sec.* 1027. When two or more charges are made or two or more indictments are found against any person, only one writ or warrant shall be necessary to commit him for trial; and it shall be sufficient to state in the writ the name or general character of the offences, or to refer to them only in very general terms.

COPY OF WRIT TO BE JAILER'S AUTHORITY.—*Sec.* 1028. Whenever a prisoner is committed to a sheriff or jailer by virtue of a writ, warrant or mittimus, a copy thereof shall be delivered to such sheriff or jailer as his authority to hold the prisoner, and the original writ, warrant or mittimus shall be returned to the proper court or officer, with the officer's return thereon.

WRIT FOR REMOVAL OF A PRISONER FROM ONE DISTRICT TO ANOTHER.—*Sec.* 1029. Only one writ or warrant is necessary to remove a prisoner from one district to another. One copy thereof may be delivered to the sheriff or jailer from whose custody the

prisoner is taken, and another to the sheriff or jailer to whose custody he is committed, and the original writs, with the marshal's return thereon, shall be returned to the clerk of the district to which he is removed.

No writ necessary to bring into court a person in custody.—*Sec.* 1030. No writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fees shall be charged by the clerk or marshal.

Peremptory challenges.—*Sec.* 1031. If, in the trial of a capital offence, the party indicted peremptorily challenges jurors above the number allowed him by law, such excess of challenges shall be disallowed by the court, and the cause shall proceed for trial in the same manner as if they had not been made. (See § 819.)

Prisoners standing mute, etc.—*Sec.* 1032. When any person indicted for any offence against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury.

Copy of indictment, etc., delivered to prisoner.—*Sec.* 1033. When any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offence, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial.

Counsel and witnesses for defendant.—*Sec.* 1034. Every person who is indicted of treason, or other capital crime, shall be allowed to make his full defence by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have access to him at

all seasonable hours. He shall be allowed in his defence to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial as is usually granted to compel witnesses to appear on behalf of the prosecution.

VERDICT OF LESS OFFENCE THAN CHARGED.—*Sec.* 1035. In all criminal causes the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged; *provided*, that such attempt be itself a separate offence.

VERDICT AGAINST PART OF SEVERAL JOINT DEFENDANTS.—*Sec.* 1036. On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury.

INDICTMENTS REMITTED BY CIRCUIT AND DISTRICT COURTS TO EACH OTHER.—*Sec.* 1037. Whenever the district attorney deems it necessary, any circuit court may, by order entered on its minutes, remit any indictment pending therein to the next session of the district court of the same district, where the offence charged in the indictment is cognizable by the said district court. And in like manner any district court may remit to the next session of the circuit court of the same district any indictment pending in the said district court. And such remission shall carry with it all recognizances, processes and proceedings pending in the case in the court from which the remission is made; and the court to which such remission is made shall, after the order of remission is filed therein, act in the case as if the indictment, and all other proceedings in the same, had been originated in said court.

REMISSION FROM DISTRICT TO CIRCUIT COURT OF DIFFICULT CASES.—*Sec.* 1038. Any district court may, by order entered on its minutes, remit any indictment pending there into the next session of the circuit court for the same district, when, in the opinion of such district court, difficult and important questions of law are involved in the case; and thereupon the proceedings in such case shall be the same in the circuit court as if such indictment had been originally found and presented therein.

ALL CAPITAL CASES REMITTED FROM DISTRICT TO CIRCUIT COURTS.—*Sec.* 1039. Every indictment of a capital offence, presented to a district court, together with the recognizances taken therein, shall, by order entered on its minutes, be remitted to the next session of the circuit court for the same district; and, on the filing of such order and indictment with the clerk of such circuit court, that court shall proceed thereon in the same manner as if said indictment had been originally found and presented therein.

CAPITAL CASE CARRIED TO THE SUPREME COURT.—*Sec.* 1040. Whenever a judgment of death is rendered in any court of the United States, and the case is carried to the Supreme Court in pursuance of law, the court rendering such judgment shall, by its order, postpone the execution thereof from time to time and from term to term, until the mandate of the Supreme Court in the case is received and entered upon the record of such lower court. In case of affirmance by the Supreme Court, the court rendering the original judgment shall appoint a day for execution thereof; and in case of reversal, such further proceedings shall be had in the lower court as the Supreme Court may direct.

JUDGMENTS FOR FINES, HOW COLLECTED.—*Sec.* 1041. In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced; *provided*, that where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid.

§ 513. **What crimes are infamous.**—It will be observed that by the provisions of section 1022 of the statutes, crimes "which are *not infamous* may be prosecuted by indictment or by information filed by a district attorney."

This term has received a construction derived from the doctrines of the common law, by which a person was made infamous by the crimes of treason, felony and the *crimen falsi*, in which latter case it was not infamous unless it not only involved the charge of falsehood, but also injuriously affected the public administration of

justice by the introduction therein of falsehood and fraud.[1] It does not necessarily follow that crimes that may be punished by imprisonment in the penitentiary are infamous;[2] as it is the nature of the act and not the character of the punishment which makes the crime infamous.[3] And offences which are merely misdemeanors cannot by any construction of the statute be considered infamous.[4]

§ 514. **Consolidation where there are two or more offences.**—Section 1024 of the statutes provides for consolidation of various charges against a defendant and of two or more indictments in certain cases.

Under this provision several offences arising out of one transaction may be charged in one indictment in different courts, although some of them are declared to be felonies, while others are not so designated;[5] and separate counts charging distinct and different felonies alleged to have been committed at different times and places may be joined in one indictment.[6] The same offence may also be charged in different ways in several counts in the same indictment to meet the facts of the case, as well as several distinct felonies of the same degree where they were committed at different times.[7]

In an indictment for passing counterfeit coin several counts may be inserted charging the passing of counterfeit coin at different times and on different occasions;[8] and a count for making false coins may be joined with a count for aiding and assisting some other person in such making, and causing and procuring some other person to make such coins.[9] So a count for an assault and battery may be joined with a count for a riot in the same indictment, if the transactions were the same or connected together;[10] but a count for a conspiracy cannot be joined with one for murder in the same indictment, unless it is shown that they refer to "the same act or transaction," or that they all are "acts or transactions connected together."[11]

[1] United States *v.* Block, 4 Saw. 211.

[2] United States *v.* Maxwell, 3 Dill. 275.

[3] United States *v.* Sawyer, 4 Saw. 211.

[4] United States *v.* Ebert, 1 Cent. L. J. 205; United States *v.* Waller, 1 Saw. 701; United States *v.* Baugh, 1 Fed. Rep. 784.

[5] United States *v.* Jacoby, 12 Blatch. 491; United States *v.* Dickinson, 2 McLean 325.

[6] United States *v.* Young, 4 C. L. N. 10; United States *v.* Burnes, 5 McLean 23.

[7] United States *v.* Pirates, 5 Wh. 184; United States *v.* O'Callahan, 6 McLean 596; United States *v.* Brent, 17 I. R. R. 54.

[8] United States *v.* O'Callahan, 6 McLean 596.

[9] United States *v.* Burnes, 5 McLean 23.

[10] United States *v.* McFarlane, 1 Cr. (C. C.) 163.

[11] United States *v.* Scott, 4 Biss. 29.

If the offence charged is in its nature several only, several persons cannot be jointly charged in the indictment with it;[1] and if there are several offences charged in one indictment and a general verdict or plea of guilty is entered, a judgment can only be entered for a single offence.[2]

For forms of indictments, see *post*, "Forms in Criminal Cases."

§ 515. **Defects of form in indictments.**—Imperfection and defects in matters of form in an indictment which do not tend to the prejudice of the defendant will not make it insufficient or affect the trial, judgment or other proceeding thereon.[3] If the meaning of the language of an indictment can be understood as charging a crime, it will be good although there may be a mistake in expressing the substance of it.[4] But an omission to state in the indictment anything which is a part of the description of the crime is a material and substantial, and not a mere formal, matter, and such an indictment is defective;[5] and an indictment which merely sets forth a paper upon which the crime charged is based, by a description of its contents instead of in *hæc verba*, would be held bad on a motion in arrest of judgment.[6]

§ 516. **Copy of indictment in treason and other capital cases, with a list of the jurors and witnesses, to be delivered to the defendant.**—It will be observed that the statute requires that when a person is indicted for treason, a copy of the indictment and a list of the jury and of the witnesses to be produced on the trial for proving the indictment, stating the abode of each juror and witness, shall be delivered to him at least three days before he is tried for the same; and when indicted for any other capital offence, such copy of the indictment and list of jurors and witnesses shall be delivered to him at least two entire days before the trial.[7]

It is not sufficient under this provision that, in case of an indictment for treason, the notice contain a mere statement of the counties where the jurors and witnesses reside, but the particular place in the county and state of their residence should be stated, that the

[1] United States *v.* Kazinski, 2 Sprague 7.

[2] United States *v.* Maguire, 3 Cent. L. J. 273; United States *v.* Blaisdell, 3 Ben. 132.

[3] Rev. Stat. § 1025; United States *v.* Tuska, 14 Blatch. 5.

[4] United States *v.* Jackson, 2 Fed. Rep. 522. See also United States *v.* Noelke, 1 Fed. Rep. 426.

[5] United States *v.* Conant, 9 Cent. L. J. 129.

[6] United States *v.* Noelke, *supra*. See also United States *v.* Kruikshank, 92 U. S. 542; United States *v.* Jacoby, 12 Blatch. 491.

[7] Rev. Stat. § 1033.

accused may prepare for his defence and be enabled to identify the jurors who are to try and the witnesses who are to prove the indictment against him.[1]

In other capital causes the copy of the indictment must be delivered at least two days before the cause is tried by a jury, but not two days before he is arraigned on the indictment. The arraignment of a prisoner is no part of the trial, but only a preliminary proceeding, and until the arraignment and plea it cannot be ascertained whether there will be a trial or not.[2]

§ 517. **Offences not capital.**—In the case of the indictment of persons for offences not capital, it is not required that the prisoners be furnished with a copy of the indictment at the expense of the government.[3] As the right to claim a copy of the indictment is not a common law right, and rests wholly upon the statute, the construction given to the statute could well rest upon the familiar maxim, *expressio unius exclusio alterius.*

But in such cases a copy may, in the discretion of the court, be ordered to be delivered to the prisoner where it is shown to be important to his pleading or defence;[4] and the court may also order a list of the witnesses sworn before the grand jury to be furnished to the accused.[5]

§ 518. **Defendant may be found guilty of a less offence.**—In all criminal cases the defendant may be found guilty of any offence which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit the offence charged in it.[6] Therefore, upon the trial of an indictment for murder a verdict of manslaughter will be good, as the crime of murder necessarily includes the crime of manslaughter.[7]

§ 519. **Indictments remitted from the circuit and district courts to each other.**—Indictments may be remitted from the circuit to the district courts, and *vice versa*, from the district to the circuit courts, in certain cases.[8] Under the provision of the section last cited a cause may be remitted on a proper motion of the district attorney

[1] United States *v.* Insurgents, 2 Dall. 335; s. c., Whart. St. Tr. 102; United States *v.* Stuart, 2 Dall. 343.

[2] Rev. Stat. § 1033; United States *v.* Curtis, 4 Mas. 232.

[3] United States *v.* Blackford, 4 Blatch. 337; United States *v.* Hare, 2 Wheel. Cr. Cas. 283.

[4] United States *v.* Curtis, 4 Mas. 232; United States *v.* Williams, *supra.*

[5] United States *v.* Southmayd, 6 Biss. 321.

[6] Rev. Stat. § 1035.

[7] United States *v.* Leonard, 2 Fed. Rep. 669.

[8] Rev. Stat. § 1037.

from the circuit court to the district court, and afterwards back to the circuit court. Thus, where an indictment was found in the circuit court, and was on motion of the district attorney remitted to the district court under the provisions of this section, and after a demurrer to the indictment was filed by the defendant it was, on a similar motion of the district attorney, remitted back to the circuit court from whence it originally came, and the United States there joined in the demurrer, and on the question as to the jurisdiction of the circuit court the judges were divided in opinion, and the point was certified to the Supreme Court, it was there held that the transfer of the indictment as aforesaid was authorized, and that the circuit court had jurisdiction.[1]

But the circuit court has no authority under the statute to remit a cause to the district court on its own motion or on the motion of the defendant; it can only be remitted on motion of the district attorney.[2] The statute provides for the transmission of criminal causes, with the proceedings therein, but does not prescribe the particular form in which the record should be sent, and it has been held that a certified copy of it was sufficient for this purpose.[3]

§ 520. **Remission from district to circuit court of difficult cases.**— The statute provides for the remission of criminal cases from the district to the circuit court for the same district when, in the opinion of the district court, difficult and important questions of law are involved in the case.[4] Under this provision it seems to be left for the district court to decide whether or not there are important questions of law involved in the case, and whether the court will enter an order for the remission. To authorize a remission on this ground the question of law should be of manifest grave importance, and the mere fact that the district judge may have given a particular exposition of a statute on which the question rests should not control the court in its action, when it is not made to appear that his exposition is in conflict with the views of any other court.[5] The district court may, in a proper case, remit an indictment, even after the adjournment of the term at which the indictment was found.[6]

[1] United States *v.* Murphy, 3 Wall. 649. See also United States *v.* Morris, 1 Curt. 23.

[2] United States *v.* Burnett, 16 Blatch. 338.

[3] United States *v.* McKee, 4 Dill. 1.

[4] Rev. Stat. § 1038.

[5] United States *v.* O'Sullivan, 9 N. Y. Leg. Obs. 193.

[6] United States *v.* Morris, 1 Curt. 23.

§ 521. **Judgments for fines; how collected.**—The statute provides that a judgment for a fine or penalty, whether alone or with any other kind of punishment, may be enforced by execution against the property of the defendant in the same manner as judgments in civil cases are enforced.[1] If the judgment provides that the defendant shall stand committed until the fine is paid, a *capias pro* fine may be issued; and if nothing is said in the judgment concerning the mode of executing it, the district attorney may elect to issue a *fi. fa.* or a *capias pro* fine.[2] If the defendant is sentenced to pay a fine he may be committed to jail until the fine is paid.[3]

[1] Rev. Stat. § 1041.
[2] *Ex parte* Louis Feuscher, 23 I. R. R. 202.
[3] United States *v.* Robins, 15 I. R. R. 155.

CHAPTER XXI.

PROVISIONS OF THE STATUTES COMMON TO MORE THAN ONE COURT OR JUDGE.

§ 522. **Exclusive jurisdiction of courts of the United States.**—The exclusive jurisdiction of the courts of the United States in certain cases and proceedings is established by the following provisions:

EXCLUSIVE JURISDICTION OF COURTS OF UNITED STATES.—*Sec.* 711. The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states:

First. Of all crimes and offences cognizable under the authority of the United States.[1]

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.[2]

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.

[1] We have already considered the subject of the jurisdiction of the district and circuit courts in criminal causes. See *ante*, ch. xx. We may here observe, however, that under the provisions of paragraph 1 of this section a state court cannot entertain an indictment for perjury committed in a proceeding before a United States commissioner on a preliminary examination of a party on the charge of having violated a penal law of the United States: Ross *v.* State of Georgia, 55 Geo. 192; *Ex parte* Dock Bridges, 2 Woods 428. See also State *v.* Kirkpatrick, 32 Ark. 117. And it may be said generally that a state court can take no cognizance of a crime against the laws of the United States: Martin *v.* Hunter, 1 Wh. 304; State *v.* Adams, 4 Black 146; State *v.* McBride, Rice 400; Commonwealth *v.* Feely, 1 Va. Cas. 321; Huber *v.* Reiley, 53 Penn. 112; State *v.* Pike, 15 N. H. 83.

We have noticed that a party may be amenable for infractions of both state and national statutes, and liable to prosecution for the same offence in either or both courts. See *ante*, §§ 138, 139, 140, 141.

[2] The state courts not only have no jurisdiction of offences against the laws of the United States, but they cannot entertain a civil suit brought by the government of the United States or any person in its behalf for a forfeiture or penalty incurred under the laws of the United States, as this provision gives the federal courts exclusive jurisdiction of such causes: Hanley *v.* Sharp, 1 Dana 442; Jackson *v.* Rose, 2 Va. Cas. 34; United States *v.* Lathrop, 17 Johns. 4. But it has been held that a state court could entertain jurisdiction of a suit brought by a person for a penalty to which he was entitled by an act of Congress: Blitz *v.* Columbia Nat. Bk., 87 Penn. 87; Ordway *v.* Central Nat. Bk., 47 Md. 217. But see Missouri River Tel. Co. *v.* First Nat. Bk., 74 Ill. 217; Ely *v.* Peck, 7 Conn. 239.

Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction.[1]

Fifth. Of all cases arising under the patent-right or copyright laws of the United States.[2]

Sixth. Of all matters and proceedings in bankruptcy.[3]

Seventh. Of all controversies of a civil nature, where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens.

Eighth.[4]

OATH OF UNITED STATES JUDGES.—*Sec.* 712. The justices of the Supreme Court, the circuit judges and the district judges, hereafter appointed, shall take the following oath before they proceed to perform the duties of their respective offices: "I, —— ——, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich,

[1] A collector who has the proceeds arising from the condemnation of a vessel for a violation of the revenue laws may be sued in a state court by a party who is entitled to a portion thereof as informer, notwithstanding this provision: Lapham *v.* Almy, 95 Mass. 301. And if he seizes a vessel for a violation of the revenue law and neglects to proceed for a condemnation of it within the time prescribed by law, he may be sued in a state court for an unlawful seizure: Stoughton *v.* Mott, 13 Vt. 175.

[2] Under this provision the jurisdiction of the federal courts is exclusive in all cases arising under the patent-right or copyright laws of the United States. But this exclusive jurisdiction is limited to those cases arising under the laws of the United States, such as controversies about infringements or between parties claiming the same exclusive right under different patents, and the like: Brown *v.* Shannon, 20 How. 56; Day *v.* Woodward, 20 How. 208; Burr *v.* Duryee, 1 Wall. 531; O'Riley *v.* Morse, 15 How. 112; Batlien *v.* Taggart, 17 How. 83; Goodyear *v.* Providence Rub. Co., 2 Fish. Pat. Cas. 499. But if the matter in dispute rests upon a contract between the parties even in relation to a patent-right or copyright, as on an assignment of it or a use in it, or the suit is to compel the specific performance of a contract for the transfer of an interest in a patent-right or copyright, or in any other case based upon a contract, which shows the right of the parties relating to it, and there is no question raised about the validity of the patent or infringements of it, the state courts may take cognizance of the suit: Hartzel *v.* Tilghman, 99 U. S. 547; Wilson *v.* Sanford, 10 How. 99; Hartshorn *v.* Day, 19 How. 211; Goodyear *v.* The Union Rubber Co., 4 Blatch. 63; Burr *v.* Gregory, 2 Paine C. C. 426; Bourcicault *v.* Hart, 13 Blatch. 47; Palte *v.* Derby, 5 McLean 328; Bourcicault *v.* Fox, 5 Blatch. 97. See also *ante*, § 159.

[3] The Bankrupt Act of 1867 was repealed by act of June 7, 1878, which took effect Sept. 1, 1878, except as to matters then pending in court: Act 45 Cong., Stat. at Large 19.

[4] Sec. 711 was amended by act of February 18, 1875, by striking out the eighth paragraph, which read as follows: "Of all suits against embassadors or other public ministers, or their domestics or domestic servants, or against consuls or vice-consuls."

and that I will faithfully and impartially discharge and perform all the duties incumbent on me as ———, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: so help me God."

JUDGES PROHIBITED FROM PRACTICING LAW.—*Sec.* 713. It shall not be lawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law. And any person offending against the prohibition of this section shall be deemed guilty of a high misdemeanor.

JUDGES RESIGNING ENTITLED, IN CERTAIN CASES, TO SALARY FOR LIFE.—*Sec.* 714. When any judge of any court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.

CRIERS OF THE COURTS, ATTENDANTS ON JURIES.—*Sec.* 715. The circuit and district courts may appoint criers for their courts, to be allowed the sum of two dollars per day, and the marshals may appoint such a number of persons, not exceeding five, as the judges of their respective courts may determine, to attend upon the grand and other juries, and for other necessary purposes, who shall be allowed for their services the sum of two dollars per day, to be paid by and included in the accounts of the marshal, out of any money of the United States in his hands. Such compensation shall be paid only for actual attendance, and when both courts are in session at the same time, only for attendance on one court.

POWER TO ISSUE WRITS.—*Sec.* 716. The Supreme Court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.[1]

[1] We have already considered the power of federal courts to grant writs of prohibition, mandamus and habeas corpus. See *ante*, ch. xv., xvi., xvii.

Scire facias is a judicial writ to enforce the execution of a judgment, and founded upon some matter of record in the cause in which it issues; and it should state the facts on which it is founded. It is in the nature of a declaration, to which the defendant may properly plead or answer: Winder *v.* Caldwell, 14 How. 434; Bently *v.* Sevier, Hemp. 250; *Ex parte* Wood, 9 Wh. 603; Wigman *v.* Southard, 10 Wh. 1; Beers *v.* Haughton, 9 Pet. 329.

WRITS OF NE EXEAT.—*Sec.* 717. Writs of ne exeat may be granted by any justice of the Supreme Court in cases where they might

The phrase "usages and principles of the law" has been interpreted as not limiting the power of the court to issue writs to the principles and usages of the common law, but as extending in such cases to the principles and usages of law as recognized in the state courts at the time of its enactment: Riggs *v.* Johnson, 6 Wall. 166; Bank *v.* Halstead, 10 Wh. 51.

WRITS OF CERTIORARI.—The power to issue "all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," embraces the power to issue the writ of certiorari: *Ex parte* Van Orden, 5 Blatch. 303; Russell *v.* Thomas, 31 Leg. Int. 189.

The writ of certiorari can only be issued as auxiliary to the exercise of judicial authority over the case or subject-matter to which it is applicable: *Ex parte* Van Arnam, 3 Blatch. 166. But a circuit court cannot issue the writ to remove a cause from the district court before a final judgment is there pronounced: Patterson *v.* United States, 2 Wh. 221. It may be used in the Supreme Court only as an ancillary process to enable that court to obtain further information in respect to some matter already before it for adjudication: United States *v.* Young, 94 U. S. 258; s. c., 12 Ct. Cl. 129. But it cannot be used to bring up a record of the proceedings that have taken place in the inferior court since an appeal: United States *v.* Adams, 9 Wall. 661.

The Supreme Court cannot issue the writ to revise the proceedings of a military commission: *Ex parte* Vallandigham, 1 Wall. 243; or to remove a cause in an inferior court because it has no jurisdiction over it: Fowler *v.* Lindsey, 3 Dall. 411; or to compel the inferior court to make a finding of facts which has been omitted: United States *v.* Adams, 9 Wall. 661; or to compel the clerk of an inferior court to append to the transcript his certificate that a transcript contains the whole record: Hodges *v.* Vaugh, 19 Wall. 12; or to correct any omissions that may have been made in the circuit court in framing a bill of exceptions: Stimpson *v.* Westchester R. Co., 3 How. 553; or to bring up the proceedings in the Court of Claims, after a new trial has been granted therein: United States *v.* Young, 94 U. S. 258; Collie *v.* United States, 12 Ct. Cl. 129. But it will issue from the Supreme Court to the Court of Claims, directing it to make return as to the existence or non-existence of some particular and material fact: United States *v.* Adams, 9 Wall. 661; United States *v.* Gomez, 1 Wall. 690; The Rio Grande, 19 Wall. 178; and it may be issued to bring up a citation which was not transmitted to the Supreme Court with a writ of error: Field *v.* Milton, 3 Cr. 514; Innerarity *v.* Byrne, 5 How. 295; or to supply an omission of a paper from a bill of exceptions and which is referred to therein: Morgan *v.* Curtenius, 19 How. 8; or to compel evidence which has been omitted from a transcript to be certified: Holmes *v.* Trout, 7 Pet. 171.

A return to a writ of certiorari is sufficient if made by the clerk and not by the judge: Stewart *v.* Ingle, 9 Wh. 526; but it should be made under his hand and the seal of the court: Fenemore *v.* United States, 3 Dall. 360.

For form, see *post*, No.

SUPERSEDEAS.—The provision of this section also authorizes the use of the writ of supersedeas, where it is necessary to the exercise of the proper jurisdiction of the court: French *v.* Shoemaker, 12 Wall. 86; Slaughterhouse Cases, 10 Wall. 273; Green *v.* Buskirk, 3 Wall. 448. But the Supreme Court cannot issue a writ of supersedeas to stay proceedings on the judgment of an inferior court upon the ground that a writ of error is pending, unless the writ was sued out within the time prescribed by law after the entry of the judgment: Adams *v.* Law, 16 How. 144; Salt-

be granted by the Supreme Court; and by any circuit justice or circuit judge in cases where they might be granted by the circuit court of which he is a judge. But no writ of ne exeat can be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States.[1]

TEMPORARY RESTRAINING ORDERS.—*Sec.* 718. Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge.[2]

INJUNCTIONS.—*Sec.* 719. Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any judge of a circuit court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in

marsh *v.* Tuthill, 12 How. 387; Hogan *v.* Ross, 11 How. 294; Wallen *v.* Williams, 7 Cr. 278.

The form of the writ must depend upon the particular circumstances of the case: Goddard *v.* Ordway, 94 U. S. 672.

OTHER WRITS.—Under the provisions of the statute under consideration writs of injunction, subpœna, subpœna *duces tecum*, attachment, assistance, inhibition and execution, may be issued from the Supreme Court, or district or circuit courts, where it may be necessary for the exercise of their respective jurisdiction and agreeable to the principles and usages of law: Fisk *v.* Union Pac. R. Co., 10 Blatch. 518; United States *v.* Williams, 4 Cr. 372; *In re* Shephard, 3 Fed. Rep. 12; Ferrell *v.* Allison, 21 Wall. 289; Penhallow *v.* Doane, 3 Dall. 54; Wyman *v.* Southard, 10 Wh. 1; Bank *v.* Halstead, 10 Wh. 51.

[1] The foundation of the claim must be an equitable debt or pecuniary claim, and be certain or capable of being reduced to a certainty: Graham *v.* Stucken, 4 Blatch. 50; Gernon *v.* Boecaline, 2 Wash. 136. And it is not sufficient that the defendant is about to leave the district, but it must appear that he intends to leave the United States: Union Insurance Co. *v.* Kellogg, 5 W. N. 477; Patterson *v.* McLaughlin, 1 Cr. C. C. 352.

[2] An injunction should not be granted without a reasonable notice, either by the court or a judge: New York *v.* Connecticut, 4 Dall. 1; Mowrey *v.* Indianapolis & C. R. Co., 4 Biss. 78. And what is a reasonable notice will depend upon the circumstances of the case. If, however, a party voluntarily appears to the application for an injunction without objection, it is a waiver of proof of notice: Marsh *v.* Bennett, 5 McLean 117; Bradley *v.* Reed, 12 Pitts. L. J. 65. But see Yungling *v.* Johnson, 1 Hughes 607.

writing, except when it cannot be heard by the circuit judge of the circuit or the district judge of the district. And an injunction shall not be issued by a district judge, as one of the judges of the circuit court, in any case where a party has had a reasonable time to apply to the circuit court for the writ; nor shall any injunction so issued by a district judge continue longer than to the circuit court next ensuing, unless so ordered by the circuit court.[1]

INJUNCTION TO STAY PROCEEDINGS IN STATE COURTS.—*Sec.* 720. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.[2] (See § 5106.)

LAWS OF THE STATES; RULES OF DECISION.—*Sec.* 721. The laws of the several states, except where the Constitution, treaties or stat-

[1] A justice of the Supreme Court may hear an application for an injunction in case of the absence or disability of the circuit and district judges: Searle *v.* Railroad, 2 Woods; and where they are all absent from the district and circuit it may be allowed by a justice allotted to another circuit: United States *v.* Canal Co., 4 Dill. 600.

The circuit court, when held by a district judge, has authority to issue the writ in all respects the same as though held by a circuit judge; but a district judge cannot in vacation allow the writ when the circuit court can be applied to: Goodyear *v.* Folsom, 3 Fed. Rep. 509; 26 I. R. R. 251. And if issued by him it ceases to be in force at the succeeding term of the circuit court unless an order is then made for its continuance: Parker *v.* Judges, 12 Wh. 561; Gray *v.* Railroad, 1 Wool. 63.

[2] As the bankrupt law has been repealed it will be unnecessary to refer to the decisions bearing upon the exceptions contained in this section, as that is virtually obsolete: 20 Statute at Large, § 99.

The restraint of the federal courts in such cases is not confined to the "writ of injunction" in its technical sense, but the statute is an inhibition against staying proceedings in the state courts, either by the writ of injunction, mandamus or prohibition, or in any other manner: Fisk *v.* Union Pac. R. Co., 6 Blatch. 362. The term "proceedings" in the statute covers all proceedings in the state court or by its officers under its process; hence, if a sheriff has possession of property under process issued from a state court, it cannot be displaced by a writ issued from a federal court: Watson *v.* Jones, 13 Wall. 679; United States *v.* Collins, 4 Blatch. 142; Evans *v.* Pack, 7 Cent. L. J. 409; Ruggles *v.* Simonton, 3 Biss. 325.

Nor can a circuit court enjoin proceedings removed from a state to a circuit court: Fisk *v.* Union Pac. R. Co., 6 Blatch. 362; Diggs *v.* Walcott, 4 Cr. 179.

Nor can the Supreme Court enjoin proceedings in a subordinate state court, although it has allowed a writ of error to the judgment of the appellate court: Slaughter-house Cases, 10 Wall. 273. Nor can a federal court interfere with property that is in the possession of a receiver appointed by a state court: Mercantile Trust Co. *v.* Railroad Co., 16 Blatch. 324. But if after the removal of a cause from the state court into the circuit court the plaintiff brings an action in the state court to recover on a judgment rendered in the cause before the removal, an injunction will be issued from the circuit court to restrain such suit: French *v.* Hay, 22 Wall. 250.

utes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.[1]

[1] RULES OF DECISIONS.—The state laws do not confer jurisdiction on the federal courts, but furnish rules of decisions in trials at common law: Orleans *v.* Phœbus, 11 Pet. 175; United States *v.* Reid, 12 How. 361; Golden *v.* Prince, 3 Wash. 313; United States *v.* Dunham, 21 L. R. 591.

CONSTRUCTION BY THE STATE COURTS.—In the construction of the statutes and laws of a state, the general principle is that the judicial department of the state is the appropriate organ for this purpose, and that decisions of the highest court of a state construing the statutes thereof are binding upon the federal courts, although the federal courts may have previously put a different construction upon them; but this doctrine does not apply where these come in conflict with the Constitution, laws or treaties of the United States: State *v.* Grand Trunk R. Co., 3 Fed. Rep. 887; Supervisors *v.* United States, 18 Wall. 71; United States *v.* Morrison, 4 Pet. 124; Van Rensselaer *v.* Kearney, 11 How. 297; Coates *v.* Muse, 1 Brock. 529; Richmond *v.* Smith, 15 Wall. 429; Walker *v.* Commissioners, 17 Wall. 648; Webster *v.* Cooper, 14 How. 488; Elmondorf *v.* Taylor, 10 Wh. 152; United States *v.* Knight, 14 Pet. 301.

WHERE THE DOCTRINE APPLIES.—The construction of the Statute of Limitations of a state, by the highest court of a state, will be followed by the federal courts: Henderson *v.* Griffin, 5 Pet. 151; Shelby *v.* Guy, 11 Wh. 361; Bell *v.* Morrison, 1 Pet. 351; Baker *v.* Jackson, 1 Paine 559. And the construction by the state courts of statutes in relation to the validity of voluntary assignments to creditors will be followed: Lloyd *v.* Fulton, 91 U. S. 479; also in relation to fraudulent conveyances: Allen *v.* Massey, 17 Wall. 351; Brashear *v.* West, 7 Pet. 608; Sumner *v.* Hicks, 2 Black 532; also relating to executors: United States *v.* Morrison, 4 Pet. 124; also affecting the title to real property: Williams *v.* Kirkland, 13 Wall. 306; Nichols *v.* Levy, 5 Wall. 433; Van Rensselaer *v.* Kearney, 11 How. 297; also relating to the power of a corporation under a statute to issue bonds: Thomas *v.* Scotland, 2 Dill. 7; and generally in construing the charters of municipal corporations: Goodrich *v.* Chicago, 4 Biss. 18; Stone *v.* Wisconsin, 94 U. S. 181; and construing the constitution of the state, as where the state court decides that a statute is void unless it appears on the legislative journals, as provided by the Constitution: South Ottawa *v.* Perkins, 94 U. S. 260; Taylor *v.* Secor, 92 U. S. 575; Kimbal *v.* Mobile, 3 Woods 555; Leavenworth *v.* Barnes, 94 U. S. 70; Boyd *v.* Alabama, 94 U. S. 645. So the decision of the highest state court construing a statute relating to the assessment or collection of taxes is binding upon the federal courts: Paine *v.* Wright, 6 McLean 395; Woodman *v.* Latimer, 2 Fed. Rep. 842. So a construction given by the highest state court to the Statute of Frauds of the state will be followed; and the construction by such state courts of statutes relating to the solemnization of marriages: Meister *v.* Moore, 96 U. S. 76; and as to the right of a corporation to condemn land: Secomb *v.* Railroad Co., 23 Wall. 108; and as to the character and extent of the jurisdiction of state tribunals: Williamson *v.* Berry, 8 How. 495; Jetter *v.* Hewitt, 22 How. 352.

WHERE THE STATE DECISIONS WILL NOT BE FOLLOWED.—The federal courts are not bound to follow the decisions of inferior state courts: Patapsco Guano Co. *v.* Morrison, 2 Woods 395; Von Brocklen *v.* Brooklyn City R. Co., 5 Blatch. 379. If the decision of the highest state court, construing a state constitution, differs from a previous construction, the federal courts will not follow the last decision where rights have been acquired under former ones: Fairfield *v.* Gallatin, 100

The act of June 1, 1874, ch. 200, 18 Stat. 50, provides: That when an occupant of land, having color of title, in good faith has made valuable improvements thereon, and is, in the proper action, found not to be the rightful owner thereof, such occupant shall be entitled in the federal courts to all the rights and remedies, and, upon instituting the proper proceedings, such relief as may be given or secured to him by the statutes of the state or territory where the land lies, although the title of the plaintiff in the action may have been granted by the United States after said improvements were so made.

PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS.—*Sec.* 722. The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this title, and of title "CIVIL RIGHTS," and of title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suit-

U. S. 47; Douglas *v.* Pike, 101 U. S. 677; Roberts *v.* Bolles, 101 U. S. 119.

LAWS OF THE SEVERAL STATES.—The language of the section, "laws of the several states," does not limit the application of the provision to laws enacted by the legislative authority of the state only, but it embraces long-established local customs having the force of laws: Swift *v.* Tyson, 16 Pet. 1. But the decisions of the state courts on questions of a general nature, and not based upon a statute of the state or long-established custom or usage, are not within the provision, and therefore not conclusive authority: Hough *v.* Railway Co., 100 U. S. 213; Olcott *v.* Supervisors, 16 Wall. 678; Boyce *v.* Tabb, 18 Wall. 546. Thus the decisions of the state courts of highest authority upon the general principles of the commercial law are not binding upon the federal courts: Oats *v.* National Bk., 100 U. S. 239; Swift *v.* Tyson, 16 Pet. 1; Williams *v.* Suffolk Ins. Co., 3 Sum. 270; 13 Pet. 415; Jewett *v.* Hone, 1 Woods 530; Austin *v.* Miller, 5 McLean 153; 13 How. 218; Wood *v.* Lutzinger, 2 Fed. Rep. 285.

The federal courts have maintained the integrity of commercial paper, and as far as was possible protected the interests of parties thereto from the unjust and frequently fluctuating decisions of the state courts. Thus the Supreme Court of the United States has frequently held that if a contract when made is valid by the laws of the state at the time, as construed by the court of highest authority in the state, and a subsequent decision of such court would invalidate such contract, such decision is not binding upon the federal courts: Gelpcke *v.* Dubuque, 1 Wall. 175; Havermeyer *v.* Iowa County, 2 Wall. 204; Thompson *v.* Lee County, 3 Wall. 327; Mitchell *v.* Burlington, 4 Wall. 270; Chicago *v.* Sheldon, 9 Wall. 50; Lee *v.* Rogers, 8 Wall. 181; City *v.* Lamson, 9 Wall. 477; Olcott *v.* Supervisors, 16 Wall. 678; Ohio Trust Co. *v.* Debolt, 16 How. 416; Pine Grove *v.* Talcott, 19 Wall. 666; Louisville, etc., R. Co. *v.* Gaines, 12 C. L. N. 407.

able remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

WHEN SUITS IN EQUITY MAY BE MAINTAINED.—*Sec.* 723. Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.[1]

Sec. 724. In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default.[2]

[1] WHERE THERE IS A PLAIN, SPEEDY AND ADEQUATE REMEDY AT LAW.—This section merely declares a common principle in relation to equity jurisdiction. We have already considered the equity jurisdiction of federal courts: *ante*, chs. x., xii. But we will here note the substance of some of the decisions bearing upon this section. The language, "plain, adequate and complete remedy . . . at law," it has been held, refers to the common law and not to the statutes of the states: Gordon *v.* Hobart, 2 Sum. 401; Dodge *v.* Woolsey, 18 How. 331; Cropper *v.* Coburn, 2 Curt. 465; Kimball *v.* Mobile, 3 Woods 555. To prevent the jurisdiction of the federal courts in equity there must be a speedy, practical and efficient remedy at law, without the aid of a court of equity: Wright *v.* Ellison, 1 Wall. 16; Grand Chute *v.* Winegar, 15 Id. 373; Hungerford *v.* Sigerson, 20 How. 156; Boyce *v.* Grundy, 3 Pet. 210; Watson *v.* Sutherland, 5 Wall. 74; Oelrichs *v.* Spain, 15 Id. 211; Morgan *v.* Beloit, 7 Id. 613; May *v.* Leclare, 11 Id. 217.

If the remedy at law can only be made available by a multiplicity of actions, a bill may be filed in equity: Garrison *v.* Memphis Ins. Co., 19 How. 312; Craine *v.* McCoy, 1 Bond 422; Plummer *v.* Connecticut Mutual Ins. Co., 1 Holmes 267.

[2] NOTICE AND MOTION TO PRODUCE.—A motion with notice to the opposite party of the time and place of hearing, and a plain designation or description of the papers or documents, the production and examination of which is desired, is sufficient: Jacques *v.* Collins, 2 Blatch. 23; United States *v.* Three Tons, 6 Biss. 379. The notice is a mere preliminary proceeding to enable the party to bring before the court the motion for the order to produce the paper or document, and at the time fixed for the making of the

The act of June 22, 1874, ch. 391, § 5, 18 Stat. 186, provides: That in all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the government, whenever, in his belief, any business book, invoice or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which

motion the defendant has a right to be heard, and he is not bound to produce them until the court shall order him so to do, and is in no default unless he neglects or refuses to obey the order: Thompson *v.* Selden, 20 How. 194; Maye *v.* Carberry, 2 Cr. C. C. 336; Bas *v.* Steele, 3 Wash. 381; Macomber *v.* Clarke, 3 Cr. C. C. 347.

The order will not be granted unless it be shown that the paper or document exists and is in the possession of the other party, and that it is material as evidence and pertinent to the issue: Iasigi *v.* Brown, 1 Curt. 401; Triplett *v.* Bank, 3 Cr. C. C. 646; Jacques *v.* Collins, 2 Blatch. 23. The opposite party may show that the document is not in his possession and prevent the issuance of the order: Bas *v.* Steele, *supra;* United States *v.* 28 Packages, Gilp. 306.

The notice and motion should be in writing, and the notice may be served upon the opposite party or his attorney: Geyger *v.* Geyger, 2 Dall. 332; United States *v.* 469 Barrels, 10 I. R. R. 205.

The order can only be to produce the books, papers or documents on the trial, and the party seeking them has no right to examine them before that time: Triplett *v.* Bank, 3 Cr. C. C. 646; nor can he require the production of a paper that would subject the opposite party to forfeiture: United States *v.* 28 Packages, Gilp. 306.

THE ORDER MUST BE SERVED.—The order for the production of the paper or document should be served on the party a reasonable time before the time fixed for its production: Macomber *v.* Clarke, 3 Cr. C. C. 347. The penalty for refusal is a nonsuit, or default, as the circumstances of the case may require: Iasigi *v.* Brown, 1 Curt. 401.

examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid.

POWER TO IMPOSE OATHS AND PUNISH CONTEMPTS.—*Sec.* 725. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority; *provided*, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer or by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the said courts.[1]

[1] THE POWER TO PUNISH FOR CONTEMPTS.—The power to punish for contempts is incidental to all courts, as this is necessary to the other powers granted to a court: United States *v.* Hudson, 9 Cr. 32; *Ex parte* Robinson, 19 Wall. 506.

The use of abusive language in the court-room is a contempt of court: United States *v.* Emerson, 4 Cr. C. C. 188. It is also a contempt of court for a person who has been acquitted of a crime to threaten vengeance on a witness against him in the presence of the court: United States *v.* Carter, 3 Cr. C. C. 423; or for a person to commit an assault and battery in the hall of entrance to the room where the court is held: United States *v.* Emerson, 4 Cr. C. C. 188.

So it is a contempt of court for a person who is summoned as a juror in a criminal case to express an opinion after the summons, for the purpose of disqualifying himself from serving as a juror: United States *v.* Devaughan, 3 Cr. C. C. 84; or for a juror to escape out of a jury-room through a window, against the commands of the bailiff: Orfutt *v.* Parrott, 1 Cr. C. C. 154; or for a juror to disobey the order of the court, not to converse with any one about the case: *In re* May, 1 Fed. Rep. 737.

WITNESSES MAY BE GUILTY OF CONTEMPT.—A witness who refuses to be sworn according to law is guilty of contempt of court: United States *v.* Coolidge, 2 Gallis 364; or refuses to answer questions: United States *v.* Caton, 1 Cr. C. C. 150; or to obey the requirements of a summons or subpœna: Voss *v.* Luke, 1 Id. 331; United States *v.* Williams, 4 Id. 372; *Ex parte* Pleasants, 4 Id. 314.

If the witness shows no disposition to treat the process of the court with contempt, but is unable by reason of sickness to comply with the process; or is detained by the dangerous illness of a member of his family, or by age, infirmity, or by any other cause which renders his absence from home oppressive or dangerous to his health, the court will not compel his attendance or punish him for a contempt: *Ex parte* Beebes, 2 Wall. Jr. 127.

OFFICERS MAY BE GUILTY OF CONTEMPT.—An officer of the court may be guilty of contempt in disobeying

NEW TRIALS.—*Sec.* 726. All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have been usually granted in the courts of law.

POWER TO HOLD TO SECURITY OF THE PEACE.—*Sec.* 727. The judges of the Supreme Court and of the circuit and district courts, the commissioners of the circuit courts, and the judges and other magistrates of the several states who are or may be authorized by law to make arrests for offences against the United States, shall have the like authority to hold to security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective states, in cases cognizable before them.

POWER TO ENFORCE AWARDS OF CONSULS.—*Sec.* 728. The district and circuit courts and the commissioners of the circuit courts shall have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration or decree of any consul, vice-consul or commercial agent of any foreign nation, made or rendered by virtue of authority conferred on him as such consul, vice-consul or commercial agent to sit as judge or arbitrator in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to his charge; application for the exercise of such power being first made

an order to pay money received by him in his official capacity: Bagley *v.* Yates. 3 McLean 465; *In re* Pitman, 1 Curt. 186; United States *v.* Mann, 2 Brock. 1. An attorney is an officer of the court, in contemplation of law, and if he collects money for his client which he refuses to pay over to him, he is liable to an attachment for a contempt. But if he has cross-demands against his client, and has not acted dishonestly in not paying over the money, he is not guilty of contempt and not properly liable to an attachment: *In re* Paschal, 10 Wall. 483.

PUNISHMENT OF THE PARTY.—There are two classes of cases in which punishment for contempt of court can be properly administered: (1) Where the guilty party has by some past act shown contempt for the court; and (2) Where he continues his contempt by refusing to comply with its orders. In the former case the court will determine the amount of the punishment from the nature and gravity of the case; in the latter case the party refusing to obey the order of the court should be fined and imprisoned until he performs the act required of him by the order of the court, or shows that it is not in his power to do so: *In re* Chiles, 22 Wall. 157.

The statute limits the punishment to fine and imprisonment, hence an attorney cannot be disbarred for contempt, although he may for misconduct: *Ex parte* Robinson, 19 Wall. 506.

to such court or commissioner by petition of such consul, vice-consul or commercial agent. And said courts and commissioners may issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration or decree, and to enforce obedience thereto by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States, until such award, arbitration or decree is complied with, or the parties are otherwise discharged therefrom by the consent in writing of such consul, vice-consul or commercial agent, or his successor in office, or by the authority of the foreign government appointing such consul, vice-consul or commercial agent; *provided, however*, that the expenses of the said imprisonment and maintenance of the prisoners, and the cost of the proceedings, shall be borne by such foreign government, or by its consul, vice-consul or commercial agent requiring such imprisonment. The marshals of the United States shall serve all such process, and do all other acts necessary and proper to carry into effect the premises, under the authority of the said courts and commissioners.

OFFENCES PUNISHABLE WITH DEATH; WHERE TRIED.—*Sec.* 729. The trial of offences punishable with death shall be had in the county where the offence was committed, where that can be done without great inconvenience.

The act of January 29, 1880, ch. 17, § 5, 21 Stat. 63, provides: Prosecutions for crimes or offences hereafter committed in either of the subdivisions (for the southern district of Georgia) shall be cognizable within such division; and all prosecutions for crimes or offences heretofore committed within either of said counties, taken as aforesaid from the northern district, or committed in the southern district as hitherto constituted, shall be commenced and proceeded with as if this act had not been passed.

The act of June 19, 1878, ch. 326, § 6, 20 Stat. 175, provides: Any person charged with violating any of the penal or criminal statutes of the United States of which the said circuit or district courts of the western district (of Michigan) have jurisdiction, shall be proceeded against by indictment or otherwise, within the division of said district where the alleged offence or offences shall be committed, and shall have his or her trial at a term of the said court

held in said division, unless, for cause shown, the judge shall otherwise direct; and one grand and one petit jury only shall be summoned, and serve in both said courts at each term thereof; and jurors shall be selected and drawn from the division of the said district in which they reside and in which the terms of the said circuit and district courts to which they are summoned are held.

The act of January 21, 1879, ch. 20, § 2, 20 Stat. 263, provides: All offences hereafter committed in either of said divisions (of the western district of Missouri) shall be cognizable and indictable within the divisions where committed; and all grand and petit jurors summoned for service in each division shall be inhabitants thereof. And all offences heretofore committed within said district shall be prosecuted and tried as if this act had not passed.

The act of June 8, 1878, ch. 169, § 4, 20 Stat. 102, provides: All offences committed in either of the subdivisions (of the northern district of Ohio) shall be cognizable and indictable within said division.

The act of February 4, 1880, ch. 18, § 5, 21 Stat. 64, provides: All prosecutions for crimes or offences hereafter committed in either of the subdivisions (of the southern district of Ohio) shall be cognizable within such division; and all prosecutions for crimes or offences heretofore committed within either of said counties taken as aforesaid from the northern district, or committed in the southern district as hitherto constituted, shall be commenced and proceeded with as if this act had not been passed.

The act of June 11, 1880, ch. 203, § 6, 21 Stat. 176, provides: All prosecutions for crimes or offences hereafter committed in either of the subdivisions (for the eastern district of Tennessee) shall be cognizable within such division; and all prosecutions for crimes or offences heretofore committed within said county taken as aforesaid from the middle district, or committed in the eastern district as hitherto constituted, shall be commenced and proceeded with as if this act had not been passed.

The act of June 14, 1880, ch. 213, § 1, 21 Stat. 198, provides: And all prosecutions in either of said districts (of Texas) for offences against the laws of the United States shall be tried in that division of the district to which process for the county in which said offences are committed is by said section required to be returned. And all

writs and recognizances in said prosecutions shall be returned to that division in which said prosecutions by this act are to be tried.

OFFENCES ON THE HIGH SEAS; WHERE TRIABLE.—*Sec.* 730. The trial of all offences committed upon the high seas or elsewhere, out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought.[1]

OFFENCES BEGUN IN ONE DISTRICT AND COMPLETED IN ANOTHER.—*Sec.* 731. When any offence against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein.

SUITS FOR PECUNIARY PENALTIES AND FORFEITURES.—*Sec.* 732. All pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found.

SUITS FOR INTERNAL REVENUE TAXES; WHERE BROUGHT.—*Sec.* 733. Taxes accruing under any law providing internal revenue may be sued for and recovered either in the district where the liability for such tax occurs or in the district where the delinquent resides.

SEIZURES; WHERE COGNIZABLE.—*Sec.* 734. Proceedings on seizures for forfeiture under any law of the United States made on the high seas may be prosecuted in any district into which the property so seized is brought and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided.

CAPTURES OF INSURRECTIONARY PROPERTY.—*Sec.* 735. As amended by act of February 18, 1875, ch. 80, 18 Stat. 318. Pro-

[1] This section relates to crimes within the maritime jurisdiction of the court: United States *v.* Alberty, 1 Hemp. 444. If the offence is committed upon the high seas, and the offender comes in the ship into one district, yet he may be tried in another district if he is first apprehended there: United States *v.* Thompson, 1 Sum. 168; United States *v.* Corrie, 23 Law Rep. 145. But if the vessel on which the offence was committed was bound to a port in the district, and the accused is in custody in the same district, this is evidence that the offender was apprehended in that district: United States *v.* Mingo, 2 Curt. 1; United States *v.* Magill, 1 Wash. 463; 4 Dall. 425. See also United States *v.* Bird, 1 Sprague 299; United States *v.* Baker, 5 Blatch. 6: United States *v.* Arwo, 19 Wall. 486.

ceedings for the condemnation of any property captured, whether on the high seas or elsewhere out of the limits of any judicial district, or within any district, on account of its being purchased or acquired, sold or given, with intent to use or employ the same, or to suffer it to be used or employed, in aiding, abetting or promoting any insurrection against the government of the United States, or knowingly so used or employed by the owner thereof, or with his consent, may be prosecuted in any district where the same may be seized, or into which it may be taken and proceedings first instituted.

PROCEEDINGS TO ENJOIN COMPTROLLER OF THE CURRENCY.—*Sec.* 736. All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located.

WHEN A PART OF SEVERAL DEFENDANTS CANNOT BE SERVED.—*Sec.* 737. When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit.[1]

[1] Under the provisions of this section any of the parties to a joint contract may be sued without joining the others who are citizens of another state: Clearwater *v.* Meridith, 21 How. 489; Doremus *v.* Bennet, 4 McLean 224; and if there are several executors an action may be maintained against one although the others may not be found in the district: United States *v.* Backus, 6 McLean 443; and if a creditor has instituted a suit against partners, some of whom are non-residents of the district, he may discontinue the suit as to the non-residents and continue it as to the others: Inbusch *v.* Farwell, 1 Black 566; and the voluntary appearance of a defendant in such a case, over whom the court has no jurisdiction, would not defeat it: Taylor *v.* Cook, 2 McLean 516.

PARTIES TO A BILL.—There are three classes of parties to a bill: I. The formal parties. 2. Persons having an interest in the controversy and who ought generally to be made parties in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice by adjusting all the rights involved in it. If, however, their interests are separable from those of other

SUITS IN EQUITY AGAINST ABSENT DEFENDANTS.—*Sec.* 738. As amended by act of March 3, 1875, ch. 137, § 8, 18 Stat. 472. That when in any suit commenced in any circuit court of the United States, to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title, to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion and upon proof of

parties before the court, so that the court can proceed to a decree and do complete and final justice without affecting the interests of those not before the court, the latter are not indispensable. 3. Persons who have not only an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience: Shields *v.* Barrow, 17 How. 130. In the latter case the court cannot, under the provisions of this section, proceed to a decree in the absence of parties whose rights must necessarily be affected by it: Mallow *v.* Hinde, 12 Wh. 193; Northern Ind. R. Co. *v.* Michigan Cent. R. Co., 15 How. 233; Ribon *v.* Railroad Co., 16 Wall. 446; Williams *v.* Bankhead, 19 Wall. 563.

WHO ARE NECESSARY PARTIES.—If a person claims an interest in the fund in controversy, and is in possession of the property given to secure the payment thereof, he is a necessary party and must be before the court in the adjudication of the matter: Williams *v.* Bankhead, 19 Wall. 563; and if the bill seeks to hold a surety liable, the principal is also a necessary party: Robertson *v.* Carson, 19 Wall. 94. If the bill is to set aside a sale made between parties, the vendor is a necessary party: Coiron *v.* Millaudon, 19 How. 113; and if partners bring an action for a debt due the firm, all the partners are necessary parties: Parsons *v.* Howard, 2 Woods 1. So if a bill is filed by a stockholder to obtain his rights, where his stock has been fraudulently transferred on the books of the corporation, the corporation is a necessary party to the suit: Kendig *v.* Dean, 97 U. S. 433. And a corporation is an indispensable party to a bill filed by a receiver to have its assets applied to the payment of a debt: Brigham *v.* Luddington, 12 Blatch. 237.

the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same state, said suit may be brought in either district in said state; *provided, however*, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.[1]

[1] The proper practice under this provision was pointed out by Judge Dillin, in Bronson *v.* Keokuk, 2 Dill. 498. The bill in such case should aver the citizenship and residence of the respective defendants, and subpœnas should be issued against all of them. If the marshal return some of them not found, and they do not appear, the court, on the showing of these and other necessary facts, should make an order for them to appear and plead by a certain day, and direct the mode of serving the same. Personal service must be made in all cases where the residence of the absent defendant is known or can be ascertained, and resort can be had to constructive notice by publication only where the better mode is not possible or not practicable within a reasonable time and by the exercise of reasonable diligence. The order directing an absent defendant to appear cannot be made until the return day of the writ, for he has until that day to appear voluntarily; and whether a personal service is practicable or not may be shown by the complainant or his attorney or agent most conversant with the facts. If it appears that the defendant resides in another district, service may be directed to be made by the marshal of that district, and perhaps the court may make a special order directing or authorizing service by some other officer.

A claim of a given number of shares of stock in a corporation, but which are not designated, is not property within the meaning of this section, but a mere chose in action.

A debtor may be made a party by an order of publication, if the bill is by a creditor to reach assets of a debtor and have them applied to the payment of his debt. But if they are citizens of the same state an order will not be granted: Bingham *v.* Luddington, 12 Blatch. 237.

SUIT BROUGHT WHERE DEFENDANTS RESIDE OR ARE FOUND.—*Sec.* 739. Except in the cases provided in the next three sections, no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and except in the said cases and the cases provided by the preceding section, no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that of which he is an inhabitant or in which he is found at the time of serving the writ.[1]

The act of January 29, 1880, ch. 17, § 4, 21 Stat. 63, provides: All suits not of a local nature in the circuit and district courts for the southern district of Georgia against a single defendant, inhabitant of said state, must be brought in the division of the district where he resides; but if there are two or more defendants residing in different divisions of the district, such suits may be brought in either division. All issues of fact in said suits shall be tried at a term of the court held in the division where the suit is so brought.

The act of June 4, 1880, ch. 120, § 2, 21 Stat. 155, provides: That all civil suits not of a local nature which shall be hereafter brought in the circuit or district court of the United States in said district of Iowa must be brought in the division of the district where the defendant or defendants reside; but if there are two or more defendants residing in different divisions, the plaintiff may sue in either one of the divisions in which a defendant resides. All issues of fact triable in either of said courts shall be tried in the division where the defendant or one of the defendants reside, unless by consent of both parties the case shall be removed to some other division. Where the defendant is a non-resident of the district, suit may be brought in any division where property or the defendant is found.

The act of June 19, 1878, ch. 326, § 3, 20 Stat. 175, provides: That all suits and proceedings hereafter to be brought in the said circuit or district courts of the western district of Michigan, not of a local nature, shall be brought in a court of the division of the district where the defendant resides; but if there be more than one defendant, and they reside in different divisions of the district, the plaintiff may sue in either division, and send duplicate writ or writs

[1] *Vide* act of March 3, 1875, ch. 137, § 1, 18 Stat. 470.

to the other defendants, on which the plaintiff or his attorney shall endorse that the writ thus sent is a copy of a writ sued out of a court of the proper division of the said district; and the said writs, when executed and returned into the office from which they issued, shall constitute one suit, and be proceeded in accordingly."

The act of January 21, 1879, ch. 20, § 3, 20 Stat. 263, provides: All civil suits not of a local character which shall be hereafter brought in the district or circuit courts of the United States for the western district of Missouri in either of said divisions, against a single defendant, or where all the defendants reside in the same division of said district, shall be brought in the division in which the defendant or defendants reside; but if there are two or more defendants residing in different divisions, such suit may be brought in either division, and all mesne and final process subject to the provisions of this act, issued in either of said divisions, may be served and executed in either or both of the divisions.

The act of June 8, 1878, ch. 169, § 3, 20 Stat. 102, provides: All suits not of a local nature in the circuit and district courts (of the northern district of Ohio) against a single defendant, inhabitant of such state, must be brought in the division of the district where he resides; but if there are two or more defendants, residing in different divisions of the district, such suits may be brought in either division. All issues of fact in such suits shall be tried at a term of the court held in the division where the suit is so brought.

The act of February 4, 1880, ch. 18, § 4, 21 Stat. 64, provides: All suits not of a local nature in the circuit and district courts (for the southern district of Ohio) against a single defendant, inhabitant of said state, must be brought in the division of the district where he resides; but if there are two or more defendants residing in different divisions of the district, such suits may be brought in either division. All issues of fact in said suits shall be tried at a term of the court held in the division where the suit is so brought.

The act of June 11, 1880, ch. 203, § 5, 21 Stat. 176, provides: All suits not of a local nature in the circuit and district courts (for the eastern district of Tennessee) against a single defendant, inhabitant of said state, must be brought in the division of the district where he resides; but if there are two or more defendants residing in different divisions of the district, such suits may be brought

in either division. All issues of fact in said suits shall be tried at a term of the court held in the division where the suit is so brought.

The act of June 20, 1878, ch. 359, § 1, 20 Stat. 235, provides: All suits not of a local character which shall be hereafter brought in the district or circuit court of the United States for the western district of Tennessee, against a single defendant, or where all the defendants reside in the same division of said district, shall be brought in the division in which the defendant or defendants reside; but if there are two or more defendants residing in different divisions, such suit may be brought in either division, and duplicate writs may be sent to the other defendants. The clerk issuing such duplicate writs shall endorse thereon that it is a true copy of a writ sued out in the proper division of the district, and the original and duplicate writs when executed and returned into the office from which they shall have issued shall be proceeded in as one suit, and all issues of fact in such suits shall be tried in the division where the suit is so brought.

SUITS NOT OF A LOCAL NATURE.—*Sec.* 740. When a state contains more than one district, every suit not of a local nature, in the circuit or district courts thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the state, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall endorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same state.

SUITS OF A LOCAL NATURE IN STATES CONTAINING SEVERAL DISTRICTS.—*Sec.* 741. In suits of a local nature, where the defendant resides in a different district, in the same state, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides.

WHEN LAND LIES IN DIFFERENT DISTRICTS.—*Sec.* 742. Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in the circuit or district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted.

WHERE ACTIONS MAY BE COMMENCED IN INDIANA.—*Sec.* 743. In the district of Indiana all actions of which the circuit and district courts have jurisdiction may be instituted in said courts, respectively, held at New Albany and Evansville, in the first instance, by filing the proper pleadings or other papers in the offices of the deputy clerks performing the duties of clerks of said courts respectively; and all proper and lawful process shall issue therefrom in the same manner as from other circuit and district courts in like cases.

WHERE SUITS MAY BE BROUGHT IN IOWA.—*Sec.* 744. In the district of Iowa all suits not of a local nature in the district court against a single defendant, inhabitant of such state, must be brought in the division of the district where he resides; but if there are two or more defendants, residing in different divisions of the district, such suits may be brought in either division, and duplicate writs may be sent to the other defendants. The clerk issuing the duplicate writ shall endorse thereon that it is a true copy of a writ sued out of the court in the proper division of the district; and the original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded in as one suit. All issues of fact in such suits shall be tried at a term of the court held in the division where the suit is so brought.

WHERE SUITS MAY BE BROUGHT IN KENTUCKY.—*Sec.* 745. In the district of Kentucky the clerks of the circuit and district courts, respectively, upon issuing original process in a civil action, shall make it returnable to the court nearest to the county of the residence of the defendant, or of that defendant whose county is nearest a court, if he have information sufficient, and shall immediately, upon payment by the plaintiff of his fees accrued, send the papers filed to the clerk of the court to which the process is made

returnable; and whenever the process is not thus made returnable, any defendant may, upon motion, on or before the calling of the cause, have it transferred to the court to which it should have been sent had the clerk known the residence of the defendant when the action was brought.

CAUSES IN PROGRESS OF TRIAL, NEW TERM.—*Sec.* 746. When the trial or hearing of any cause, civil or criminal, in a circuit or district court, has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; and the court may proceed therein and bring it to a conclusion, in the same manner and with the same effect as if another stated term of the court had not intervened.

PARTIES MAY MANAGE THEIR CAUSES PERSONALLY.—*Sec.* 747. In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein.

OFFICERS FORBIDDEN TO PRACTICE AS ATTORNEYS.—*Sec.* 748. No clerk, assistant or deputy clerk, of any territorial, district or circuit court, or of the Court of Claims, or the Supreme Court of the United States, or marshal or deputy marshal of the United States within the district for which he is appointed, shall act as a solicitor, proctor, attorney or counsel in any cause depending in either of said courts, or in any district for which he is acting as such officer.

PENALTY FOR VIOLATING THE PRECEDING SECTION.—*Sec.* 749. Whosoever violates the preceding section shall be stricken from the roll of attorneys by the court upon complaint, upon which the respondent shall have due notice, and be heard in his defence; and in the case of a marshal or deputy marshal so acting, he shall be recommended by the court for dismissal from office.

FINAL RECORD IN EQUITY AND ADMIRALTY.—*Sec.* 750. In equity and admiralty causes, only the process, pleadings and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings, shall be entered upon the final record. (See § 698.)

CHAPTER XXII.

PROVISIONS OF THE STATUTES RELATING TO JURIES.

§ 523. **Jurors, qualification, selection, and the constitution of juries.**— The Revised Statutes, with the amendments thereof, provide for the qualification and selection of grand and petit jurors, and the constitution of juries, as follows:

JURORS, QUALIFICATIONS AND MODE OF SELECTION.—*Sec.* 800. Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they shall be designated by ballot, lot or otherwise, according to the mode of forming such juries then practiced in such state court, so far as such mode may be practicable by the courts of the United States or the officers thereof. And for this purpose the said courts may, by rule or order, conform the designation and empannelling of juries, in substance, to the laws and usages relating to jurors in the state courts, from time to time in force in such state. (See § 1671.)

The act of March 1, 1875, ch. 114, § 4, 18 Stat. 336, provides: That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any state, on account of race, color or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.[1]

[1] The act of March 1, 1875, ch. 114, § 4, 18 Stat. at Large 336, provides that no citizen possessing other qualifications shall be disqualified as a juror in the federal or state courts on account of race, color or previous condition of servitude.

The act of June 20, 1879, ch. 52, § 2, 21 Stat. at Large 43, amends this section by providing how jurors shall be drawn, and that persons shall not be disqualified on account of race, color or previous condition of servitude.

The act of June 20, 1879, ch. 52, § 2, 21 Stat. 43, provides: That the per diem pay of each juror, grand or petit, in any court of the United States shall be two dollars; and that the last clause of section 800 of the Revised Statutes of the United States, which refers to the state of Pennsylvania, and sections 801, 820 and 821

The provisions of this last act are not merely directory but mandatory: United States *v.* Ambrose, 5 C. L. R. 360; 3 Fed. Rep. 283.

Qualification of jurors. — The word "qualification" in this section refers to general qualifications, such as age or citizenship, or anything else relating to his personal standing, but not to such matters as would render a turor unfit from acting in some parjicular case: United States *v.* Collins, 1 Woods 499; United States *v.* Williams, 1 Dill. 485.

The federal courts have no discretion in reference to jurors, as the law requires that they shall have like qualifications and be entitled to like exemptions as jurors in the highest courts of law of the state, under the laws of the state: United States *v.* Wilson, 6 McLean 604; United States *v.* Gardner, 5 C. L. N. 501.

The state laws relating to challenges to jurors are in force under this provision: United States *v.* Reed, 2 Blatch. 435; United States *v.* Tuska, 14 Blatch. 5. But if an act of Congress expressly provides for peremptory challenges in particular cases, no state law can affect this right: United States *v.* Shackelford, 18 How. 288. Nor does this section affect the right to a peremptory challenge, as it is not based upon the qualification of the juror, or upon the right to exemption: United States *v.* Douglass, 2 Blatch. 207; United States *v.* Devlin, 6 Blatch. 71. Nor does the section refer to the number of which the pannel shall consist: United States *v.* Insurgents, 2 Dall. 335; United States *v.* Collins, 1 Woods 499. And the jurors should be selected from the district at large: United States *v.* Woodruff, 4 McLean 105. The right to peremptory challenges is now regulated by statute. See Rev. Stat. § 819, *post*.

Mode of drawing jurors. — The mode of obtaining a jury is now provided for by the act of June 20, 1879. Under the former provisions of the statute relating thereto it was held as follows: A literal conformity to the mode of selecting and drawing jurors prescribed by the laws of a state is not required, unless it is adopted by a rule of the federal court, and substantial conformity only is necessary: United States *v.* Tallman, 10 Blatch. 21; Alston *v.* Manning, 1 Chase 460.

In these matters the federal courts may exercise a discretion as to the best mode of securing the main object of the law, which is to secure jurors properly qualified, and selected and empannelled substantially according to the mode required to be pursued by the laws of the state: United States *v.* Collins, 1 Woods 499; United States *v.* Wilson, 6 McLean 604; United States *v.* Gardner, 5 C. L. N. 501; United States *v.* Tallman, 10 Blatch. 21.

The jurors need not be taken from the lists made by the state authorities. Conformity with the state laws is required in two respects only: 1. In reference to the qualification and exemption of jurors. 2. In reference to the mode of designating and empannelling jurors, as by ballot, lot or otherwise; which mode must conform to that in substance pursued by the state courts: United States *v.* Gardner, 5 C. L. N. 501; United States *v.* Collins, 1 Woods 499. But this act has no application to the selecting of jurors for the territorial courts, as they are not courts of the United States within the meaning of this section: Clinton *v.* Englebrecht, 13 Wall. 434. See also American Ins. Co. *v.* Canton, 1 Pet. 546; Benner *v.* Porter, 9 How. 235.

of the Revised Statutes of the United States are hereby repealed; and that all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons possessing the qualifications prescribed in section 800 of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein. But nothing herein contained shall be construed to prevent any judge from ordering the names of jurors to be drawn from the boxes used by the state authorities in selecting jurors in the highest courts of the state; and no person shall serve as a petit juror more than one term in any one year, and all juries to serve in courts after the passage of this act shall be drawn in conformity herewith; *provided*, that no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color or previous condition of servitude.

Sec. 801. Repealed.

JURORS, HOW APPORTIONED IN DISTRICTS.—*Sec.* 802. Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense or unduly to burden the citizens of any part of the district with such services.

VENIRE; HOW ISSUED AND SERVED.—*Sec.* 803. Writs of venire facias, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or, in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ.

TALESMEN FOR PETIT JURIES.—*Sec.* 804. When, from challenges or otherwise, there is not a petit jury to determine any civil or crim-

inal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the pannel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section.

SPECIAL JURIES IN CIRCUIT COURTS.—*Sec.* 805. When special juries are ordered in any circuit court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several states.

JURY IN NORTHERN NEW YORK.—*Sec.* 806. No jury shall be drawn for service exclusively in the circuit court for the northern district of New York at the adjourned terms thereof required by law to be held at Albany and Utica, but the jury drawn to serve in the district court held at the same times and places with said adjourned terms shall be used for the trial of issues of fact arising in civil causes in said circuit court, and the verdicts of said jury, and all proceedings upon the trial of said issues, shall be of the same effect as if the said jury had been drawn to serve in the said circuit court.

PETIT JURY IN VERMONT.—*Sec.* 807. The clerk of the district court for Vermont shall not cause a petit jury to be summoned or returned to any session in which there shall appear to be no issue proper for trial by jury, unless by special order of the judge.

NUMBER OF GRAND JURORS; COMPLETING THE JURY.—*Sec.* 808. Every grand jury empannelled before any district or circuit court shall consist of not less than sixteen nor more than twenty-three persons. If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose.[1]

[1] Notwithstanding the provision of this section, the federal courts have power to determine what number of persons shall be summoned in order that a grand jury may be selected or constituted therefrom: United States *v.* Tuska, 14 Blatch. 5.

This section applies only to the district and circuit courts, and does not embrace territorial courts: Reynolds *v.* United States, 98 U. S. 145.

APPOINTMENT AND POWERS OF THE FOREMAN OF GRAND JURY.—*Sec.* 809. From the persons summoned and accepted as grand jurors, the court shall appoint the foreman, who shall have power to administer oaths and affirmations to witnesses appearing before the grand jury.

GRAND JURIES; WHEN SUMMONED.—*Sec.* 810. No grand jury shall be summoned to attend any circuit or district court unless one of the judges of such circuit court, or the judge of such district, in his own discretion, or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. And either of the said courts may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. But nothing herein shall operate to extend beyond the time permitted by law the imprisonment before indictment found of a person accused of a crime or offence, or the time during which a person so accused may be held under recognizance before indictment found.[1]

DISCHARGE OF GRAND JURIES.—*Sec.* 811. The circuit and district courts, the district courts of the territories, and the supreme court of the District of Columbia, may discharge their grand juries whenever they deem a continuance of the sessions of such juries unnecessary.

JURORS NOT TO BE SUMMONED OFTENER THAN ONCE IN TWO YEARS.—*Sec.* 812. No person shall be summoned as a juror in any circuit or district court more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of such challenge.

GRAND JURORS MAY ACT IN CASES COGNIZABLE IN CIRCUIT COURTS.—*Sec.* 813. The grand jury empannelled and sworn in any district court may take cognizance of all crimes and offences within the jurisdiction of the circuit court for said district as well as of said district court.

[1] It is not necessary that the order contemplated in this section should be put on file by the judge himself, but it may be entered by the clerk with the same effect, as in contemplation of law, what is done by the clerk under the authority of the judge is done by the judge himself. It is the duty of the clerk to issue a venire, under the provisions of this section, upon the order of the judge, but an omission of such order is a mere technical omission, and cannot constitute the basis of an application, addressed only to the discretion of the court: United States *v.* Reed, 2 Blatch. 435.

JURORS IN WESTERN DISTRICT OF ARKANSAS.—*Sec.* 814. In the western district of Arkansas such number of jurors shall be summoned at every term of the district court thereof, to be held at Helena, as may have been ordered at a previous term or by the district judge in vacation. And a grand jury may be summoned to attend any such term when ordered by the court or by the judge in vacation. In case of a deficiency of jurors, talesmen may be summoned by order of the court.

JURORS IN KENTUCKY AND INDIANA.—*Sec.* 815. In the several districts of Kentucky and Indiana, such number of jurors shall be summoned by the marshal at every term of the circuit and district courts respectively as may have been ordered of record at the previous term; and in case there is not a sufficient number of jurors in attendance at any time, the court may order such number to be summoned as, in its judgment, may be necessary to transact the business of the court. And a grand jury may be summoned to attend every term of the circuit or district court by order of the court. The marshal may summon juries and talesmen in case of a deficiency, pursuant to an order of the court made during the term, and they shall serve for such time as the court may direct.

JURIES AT SPECIAL TERMS IN NORTH CAROLINA.—*Sec.* 816. The circuit and district courts for either of the districts of North Carolina may order a grand or petit jury, or both, to attend any special term thereof, by an order to be entered of record thirty days before the day on which such special term is appointed to convene.

JURIES FOR WESTERN DISTRICT OF SOUTH CAROLINA.—*Sec.* 817. The grand and petit jurors for the district court sitting in the western district of South Carolina shall be drawn from the inhabitants of said district who are liable, according to the laws of said state, to do jury duty in the courts thereof; and all jurors shall be drawn during the sitting of the court for the next succeeding term.

CHARGE TO GRAND JURIES IN VERMONT.—*Sec.* 818. In the district of Vermont it shall be the duty of the circuit court, at its regular sessions, to give in charge to the grand jury all crimes, offences and misdemeanors which are cognizable as well in the district court thereof as in the said circuit court.

The act of April 20, 1880, ch. 58, § 2, 21 Stat. 76, provides: Whenever the terms of the said circuit and district courts (for the district of Colorado) shall be held at the same time and place, grand

and petit jurors summoned to attend in either of said courts may serve in the other of said courts, and but one grand or petit jury shall be summoned to attend on said courts at one and the same time; but this provision shall not prevent either of said courts from procuring the attendance of several pannels of jurors successively, as the business of the courts may require.

The act of January 29, 1880, ch. 17, § 8, 21 Stat. 63, provides: All grand and petit jurors summoned for service in each division (for the southern district of Georgia) shall be residents of such division. All mesne and final process, subject to the provisions hereinbefore contained, issued in either of said divisions may be served and executed in either or both of the divisions.

The act of June 8, 1878, ch. 169, § 6, 20 Stat. 102, provides: All grand and petit jurors summoned for service in each division (of the northern district of Ohio) shall be residents of such division. All mesne and final process, subject to the provisions hereinbefore contained, issued in either of said divisions, may be served and executed in either or both of the divisions.

The act of February 4, 1880, ch. 18, § 7, 21 Stat. 64, provides: All grand and petit jurors summoned for service in each division (for the southern district of Ohio) shall be residents of such division. All mesne and final process subject to the provisions hereinbefore contained, issued in either of said divisions, may be served and executed in either or both of the divisions.

The act of June 11, 1880, ch. 203, § 7, 21 Stat. 176, provides: All grand and petit jurors summoned for service in each division (for the eastern district of Tennessee) shall be residents of such division. All mesne and final process subject to the provisions hereinbefore contained, issued in either of said divisions, may be served and executed in either or both of the divisions.

CHALLENGES.—*Sec.* 819. When the offence charged is treason or a capital offence, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All

challenges, whether to the array or pannel or to individual jurors for cause or favor, shall be tried by the court without the aid of triers.[1] (See §§ 1031, 4303.)

SECTION 820 REPEALED.—*Sec.* 820. Repealed by act of June 20, 1879, ch. 52, § 2, 21 Stat. 43.

SECTION 821 REPEALED.—*Sec.* 821. Repealed by act of June 20, 1879, ch. 52, § 2, 21 Stat. 43.

GRAND AND PETIT JURORS IN CERTAIN CASES.—*Sec.* 822. No person shall be a grand or petit juror in any court of the United States upon any inquiry, hearing or trial of any suit, proceeding or prosecution based upon or arising under the provisions of title "Civil Rights" and of title "Crimes," for enforcing the provisions of the fourteenth amendment to the Constitution, who is, in the judgment of the court, in complicity with any combination or conspiracy in said titles set forth; and every grand and petit juror shall, before entering upon any such inquiry, hearing or trial, take and subscribe an oath, in open court, that he has never directly or indirectly counselled, advised or voluntarily aided any such combination or conspiracy.

[1] The words "any other felony" in this section designate other offences than those that are capital, for they are otherwise specially provided for by the provisions of this section: United States *v.* Coppersmith, 22 A. L. J. 250; 4 Fed. Rep. 198. If a criminal case is removed from a state court, the number of peremptory challenges is regulated by this section and not by the state law: Georgia *v.* O'Grady, 3 Woods 496. In cases other than capital ones this section gives the defendant ten challenges in the following cases:

1. Where the offence is declared by statute expressly or impliedly to be a felony.

2. Where Congress does not define an offence, but simply punishes it by its common law name, and at common law it is a felony.

3. Where Congress adopts a state law providing what is an offence, and under such law it is a felony: United States *v.* Coppersmith, 22 A. L. J. 250; 4 Fed. Rep. 198.

CHAPTER XXIII.

FEES AND COSTS.

§ 524. **Provisions of the statutes relating to fees of officers.**—The Revised Statutes provide for the fees of federal judicial officers, attorneys and witnesses, and for costs, as follows:

FEES TAXED AND ALLOWED.—*Sec.* 823. The following and no other compensation shall be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors and printers in the several states and territories, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective states, or may be agreed upon between the parties.[1]

FEES OF ATTORNEYS, SOLICITORS AND PROCTORS.—*Sec.* 824. On a trial before a jury in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars; *provided*, that in cases of admiralty and maritime

[1] DOCKET FEES.—This provision was designed to prevent a practice in the federal courts, prevailing for some time, of allowing fees in the discretion of the courts. It was intended to remedy a great evil, and is vigorously enforced to carry out the intention: Simpson *v.* Brooks, 3 Blatch. 456.

Every item of fees of officers of the court must be specified in the fee bill, and the court cannot go outside the provision to make any allowance of costs on any considerations of justice. And the province of the taxing officer is limited to a comparison of the charges made with the provisions of the statute; and when the charge is found not to be within the enumerated fees of the statute, it is rejected: Dedekam *v.* Vose, 3 Blatch. 153; Lyell *v.* Miller, 6 McLean 422; United States *v.* Package, 16 Law Rep. 284; United States *v.* Smith, N. & M. 184.

Costs for printing testimony will not be allowed, as no provision is made therefor: Spaulding *v.* Tucker, 2 Saw. 50; 4 Fish 633; Hussey *v.* Bradley, 5 Blatch. 210; Troy I. & N. Fac. *v.* Corning, 7 Blatch. 16.

But the statute does not prohibit the allowance of such disbursements as are made necessary by the order of the court: Dennis *v.* Eddy, 12 Blatch. 195; Brooks *v.* Byam, 2 Story 553. And if a rule of court requires briefs to be printed, the expense thereof may be taxed: Neff *v.* Pennoyer, 3 Saw. 335.

jurisdiction, where the libellant recovers less than fifty dollars, the docket fee of his proctor shall be but ten dollars.

In cases at law, when judgment is rendered without a jury, ten dollars.

In cases at law, when the cause is discontinued, five dollars.

For scire facias and other proceedings on recognizances, five dollars.

For each deposition taken and admitted in evidence in a cause, two dollars and fifty cents.

For services rendered in cases removed from a district to a circuit court by writ of error or appeal, five dollars.

For examination by a district attorney, before a judge or commissioner, of persons charged with crime, five dollars a day for the time necessarily employed.

For each day of his necessary attendance in a court of the United States on the business of the United States, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the term.

For travelling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning.

When an indictment for crime is tried before a jury and a conviction is had, the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding thirty dollars.[1]

[1] Nothing can be taxed as incident to the judgment against the failing party for the services of attorneys, solicitors or proctors, except the costs and fees enumerated in the statute: The Baltimore, 8 Wall. 377; The Liverpool Packet, 2 Sprague 37; Derry *v.* Hersey, 21 Law Rep. 473; Cauter *v.* American Ins. Co., 3 Pet. 307.

Twenty dollars is the highest fee that can be allowed to an attorney in a cause, and it can be allowed but once: Troy I. & N. Fac. *v.* Corning, 7 Blatch. 16; Dedekam *v.* Vose, 3 Blatch. 153; Goodyear *v.* Osgood, 13 O. G. 325.

If a cause has been removed from a state court, no more fees can be allowed than those provided by the statute: Clare *v.* National Cit. Bank, 14 Blatch. 445.

In cases at law, if there is a waiver of a jury and a trial to the court, only ten dollars can be taxed as costs. But if a libellant discontinues his suit after a witness has been sworn, a docket fee of twenty dollars will be

FEES IN REVENUE AND OTHER CASES.—*Sec.* 825. There shall be taxed and paid to every district attorney two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws, and conducted by him, in which the United States is a party, which shall be in lieu of all costs and fees in such proceeding.[1]

FEES OF DISTRICT ATTORNEY FOR DEFENCE OF REVENUE OFFICERS.—*Sec.* 827. When a district attorney appears by direction of the Secretary or Solicitor of the Treasury, on behalf of any officer of the revenue in any suit against such officer, for any act done by him, or for the recovery of any money received by him and paid into the treasury in the performance of his official duty, he shall receive such compensation as may be certified to be proper by the court in which the suit is brought, and approved by the Secretary of the Treasury. (See § 4646.)

CLERK'S FEES.—*Sec.* 828. For issuing and entering every process, commission, summons, capias, execution, warrant, attachment, or other writ except a writ of venire, or a summons or subpœna for a witness, one dollar.

For issuing a writ of summons or subpœna, twenty-five cents.

allowed: Jones *v.* Schell, 8 Blatch. 79; The Bay City, 3 Fed. Rep. 47. So in case a cause is dismissed because an appellant gave no security for costs, the fee of twenty dollars will be allowed: Hayford *v.* Griffith, 3 Blatch. 79.

The statute provides a fee for each deposition of two dollars and fifty cents. This does not embrace affidavits. A deposition is evidence given by a witness under interrogatories, oral or written, and the evidence is usually written down by an official person, while an affidavit is a voluntary act on the part of the person making the oath, and may be, and generally is, taken without the cognizance of the person against whom it is to be used. It is *ex parte* and not included in the statute under consideration, providing for a fee for depositions: Stimpson *v.* Brooks, 3 Blatch. 456; Beckwith *v.* Easton, 4 Ben. 357.

[1] This section has been held to apply to cases arising under the internal revenue laws, as well as to those arising under the common revenue laws: United States *v.* 500 Barrels, 2 Bond 7.

The "two per centum" is in the nature of a contingent fee dependent upon the collection of the money, and if the contingency does not occur, the right to the per centum does not attach: The Pacific, Deady 192. The per centum cannot be taxed in the judgment against the defendant, as the district attorney is only entitled to it upon "moneys collected or realized:" King *v.* United States, 99 U. S. 229.

Although a seizure in one district leads to a discovery of fraud in another district, and a compromise of the whole matter, the district attorney is not entitled to the per centum on the whole amount received on the compromise, but only on the amount received on the compromise of the seizure in his own district: United States *v.* 500 Barrels, 2 Bond 7.

If the district attorney is unsuccessful, still he is entitled to his ordinary statute fee: King *v.* United States, 99 U. S. 229.

For filing and entering every declaration, plea or other paper, ten cents.

For administering an oath or affirmation, except to a juror, ten cents.

For taking an acknowledgment, twenty-five cents.

For taking and certifying depositions to file, twenty cents for each folio of one hundred words.

For a copy of such depositions furnished to a party on request, ten cents a folio.

For entering any return, rule, order, continuance, judgment, decree or recognizance, or drawing any bond, or making any record, certificate, return or report, for each folio, fifteen cents.

For a copy of any entry or record, or of any paper on file, for each folio, ten cents.

For making dockets and indexes, issuing venire, taxing costs and all other services, on the trial or argument of a cause where issue is joined and testimony given, three dollars.

For making dockets and indexes, taxing costs and all other services, in a cause where issue is joined but no testimony is given, two dollars.

For making dockets and indexes, taxing costs and other services, in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, one dollar.

For making dockets and taxing costs, in cases removed by writ of error or appeal, one dollar.

For affixing the seal of the court to any instrument, when required, twenty cents.

For every search for any particular mortgage, judgment or other lien, fifteen cents.

For searching the records of the court for judgments, decrees or other instruments constituting a general lien on real estate, and certifying the result of such search, fifteen cents for each person against whom such search is required to be made.

For receiving, keeping and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept and paid.

For travelling from the office of the clerk, where he is required to reside, to the place of holding any court required by law to be held, five cents a mile for going and five cents for returning, and

five dollars a day for his attendance on the court while actually in session.

All books in the offices of the clerks of the circuit and district courts, containing the docket or minute of the judgments or decrees thereof, shall, during office hours, be open to the inspection of any person desiring to examine the same, without any fees or charge therefor.[1]

MARSHAL'S FEES.—*Sec.* 829. For service of any warrant, attachment, summons, capias or other writ, except execution, venire or a summons or subpœna for a witness, two dollars for each person on whom service is made.

For the keeping of personal property attached on mesne process such compensation as the court, on petition setting forth the facts under oath, may allow.

For serving venires and summoning every twelve men as grand or petit jurors, four dollars, or thirty-three and one-third cents each. In states where, by the laws thereof, jurors are drawn by lot, by constables or other officers of corporate places, the marshal shall receive for each jury two dollars for the use of the officers employed in drawing and summoning the jurors and returning each venire, and two dollars for his own services in distributing the venires. But the fees for distributing and serving venires, drawing and summoning jurors by township officers, including the mileage chargeable by the marshal for each service, shall not at any court exceed fifty dollars.

For holding a court of inquiry or other proceedings before a jury, including the summoning of a jury, five dollars.

For serving a writ of subpœna on a witness, fifty cents; and no

[1] The clerk may charge a fee where the cause is continued on account of the absence of a defendant: *Ex parte* Lee, 4 Ct. Cl. 197; and he is entitled to a commission upon the proceeds of property sold upon an interlocutory order and paid into court by the marshal: The Avery, 2 Gall. 308; *Ex parte* Prescott, 2 Gall. 146. But a fund, although the subject of a decree of the court, does not entitle the clerk to a commission thereon, unless it is paid into court: *Ex parte* Plitt, 2 Wall, Jr. 453. To entitle the clerk to commissions on money received, kept and paid out, it is not sufficient that it be paid, under an order or agreement, to the person who is entitled to receive it. Such a case would not be within the provisions of the statute: *In re* Goodrich, 4 Dill. 230; Upton *v.* Triblecock, 4 Dill. 232. But if a marshal pays the proceeds of a sale on execution into court, the clerk is entitled to a commission for the money so received: Kitchen *v.* Woodfin, 1 Hughes 340; *In re* Goodrich, 4 Dill. 230; The Avery, 2 Gall. 308; *Ex parte* Prescott, 2 Gall. 146. As to the right to inspect records, see *In re* McLean, 9 Cent. L. J. 425.

further compensation shall be allowed for any copy, summons or notice for a witness.

For serving a writ of possession, partition, execution or any final process, the same mileage as is allowed for the service of any other writ, and for making the service, seizing or levying on property, advertising and disposing of the same by sale, set-off or otherwise according to law receiving and paying over the money, the same fees and poundage as are or shall be allowed for similar services to the sheriffs of the states, respectively, in which the service is rendered.

For each bail-bond, fifty cents.

For summoning appraisers, fifty cents each.

For executing a deed prepared by a party or his attorney, one dollar.

For drawing and executing a deed, five dollars.

For copies of writs or papers furnished at the request of any party, ten cents a folio.

For every proclamation in admiralty, thirty cents.

For serving an attachment in rem or a libel in admiralty, two dollars.

For the necessary expenses of keeping boats, vessels or other property attached or libelled in admiralty, not exceeding two dollars and fifty cents a day.

When the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per centum on the first five hundred dollars of the claim or decree, and one-half of one per centum on the excess of any sum thereof over five hundred dollars; *provided*, that when the value of the property is less than the claim, such commission shall be allowed only on the appraised value thereof.

For sale of vessels or other property under process in admiralty, or under the order of a court of admiralty, and for receiving and paying over the money, two and one-half per centum on any sum under five hundred dollars, and one and one-quarter per centum on the excess of any sum over five hundred dollars.

For disbursing money to jurors and witnesses, and for other expenses, two per centum.

For expenses while employed in endeavoring to arrest, under

process, any person charged with or convicted of a crime, the sum actually expended, not to exceed two dollars a day, in addition to his compensation for service and travel.

For every commitment or discharge of a prisoner, fifty cents.

For transporting criminals, ten cents a mile for himself and for each prisoner and necessary guard; except in the case provided for in the next paragraph.

For transporting criminals convicted of a crime in any district or territory where there is no penitentiary available for the confinement of convicts of the United States, to a prison in another district or territory designated by the Attorney-General, the reasonable actual expense of transportation of the criminals, the marshal and the guards, and the necessary subsistence and hire.

For attending the circuit and district courts, when both are in session, or either of them when only one is in session, and for bringing in and committing prisoners and witnesses during the term, five dollars a day.

For attending examinations before a commissioner, and bringing in, guarding and returning prisoners charged with crime, and witnesses, two dollars a day; and for each deputy not exceeding two, necessarily attending, two dollars a day.

For travelling from his residence to the place of holding court, to attend a term thereof, ten cents a mile for going only.

For travel, in going only, to serve any process, warrant, attachment or other writ, including writs of subpœna in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service, or, when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others. But when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs; and to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpœna as convenience in serving the same will permit.

In all cases where mileage is allowed to the marshal he may elect

to receive the same or his actual travelling expenses, to be proved on his oath, to the satisfaction of the court.[1] (See § 1660.)

MARSHAL'S FEES IN PARTICULAR CASES.—*Sec.* 830. There shall be paid to the marshal his fees for services rendered for the United States, for summoning jurors and witnesses in behalf of the United States, and in behalf of any prisoner to be tried for a capital offence, for the maintenance of prisoners of the United States confined in jail for any criminal offence; also for his reasonable actual expense for the transportation of criminals, and of the marshal and guards, to prisons designated by the Attorney-General, and for hire and subsistence in that behalf, as hereinbefore provided; also his fees for the commitment or discharge of prisoners; his expenses necessarily incurred for fuel, lights and other contingencies that may accrue in holding the courts within his district, and providing the books necessary to record the proceedings thereof; *provided*, that he shall not incur or be allowed an expense of more than twenty

[1] A marshal is entitled to two dollars for the service of a venire on a state officer, where jurors are required to be drawn by such officer, but not to any mileage in serving the same: United States *v.* Smith, W. & M. 184.

FEES ON EXECUTION AND OTHER PROCESS.—Fees on execution and other process are regulated by the laws of the state, prescribing the fees of sheriffs for similar services. No further allowance than two dollars and fifty cents a day can be made for keeping property: The Circassian, 6 Ben. 512; The Hibernia, 1 Sprague 78; Bottomley *v.* United States, 1 Story 153. The sum of two dollars and fifty cents is not allowed unless it is reasonable, and only the actual and reasonable expenses of keeping and taking care of property actually in the possession of the marshal will be allowed: United States *v.* 500 Barrels, 1 Ben. 72. And the claim must be established by vouchers or otherwise to the satisfaction of the court: The Free Trader, 1 Brown 72; The Phebe, 1 Ware 354. He is also entitled to charge for expenses of a deputy employed in making an arrest, not exceeding two dollars and fifty cents per day: United States *v.* Harker, 3 Saw. 337.

MARSHAL'S COMMISSIONS. — If the claim or debt in a case in admiralty is settled after an attachment or libel of property without a sale, a commission is allowed the marshal of one and one-half per cent.; if there is a sale, the commission thereon goes to the marshal to whom the process or order for a sale belongs for execution and who makes the sale: The Russia, 5 Ben. 84; The City of Washington, 13 Blatch. 410. But the marshal is not entitled to any commissions if the suit is settled before any claimant appears: The Russia, 5 Ben. 84; The Norma, New 533.

FEES IN OTHER CASES.—A marshal is entitled to the fee for commitment of a person, whether it be on the final judgment or the order of the court, and whether a party to the case or a witness: *Ex parte* Virgel Paris, 3 W. & M. 227; but not to the fee allowed on the discharge of a prisoner from custody, where he is merely brought into court to testify or to be tried: Id.

If a marshal serves a subpœna on a witness out of the state, he cannot charge mileage for more than one hundred miles, although he may have travelled a greater distance: Parker *v.* Bigler, 1 Fish. 285.

dollars in any one year for furniture, or fifty dollars for rent of a building and making improvements thereon, without first submitting a statement and estimates to the Attorney-General and getting his instructions in the premises.[1]

NO PER DIEM CAN BE ALLOWED TO OFFICERS.—*Sec.* 831. No per diem or other allowance shall be made to any district attorney, clerk of a circuit court, clerk of a district court, marshal or deputy marshal, for attendance at rule days of a circuit or district court; and when the circuit and district courts sit at the same time no greater per diem or other allowance shall be made to any such officer than for an attendance on one court.

NO MILEAGE CAN BE ALLOWED EXCEPT FOR ACTUAL TRAVEL.—*Sec.* 832. The marshal of the Supreme Court of the United States shall be entitled to receive for the service of any warrant, attachment, summons, capias or other writ, except execution, venire, or a summons or subpœna for a witness, one dollar for each person on whom such service may be made. His fees for all other services shall be the same as are herein allowed to other marshals; but he shall pay into the treasury of the United States all fees received by him, and render a true account thereof at the close of each term to the Attorney-General.

The act of February 22, 1875, ch. 95, § 7, 18 Stat. 334, provides: That the proviso in the sixth paragraph of the act entitled "An act making appropriations for the support of the army for the fiscal year ending June 30, 1875, and for other purposes," approved June 16, 1874, shall not be construed to apply or to have applied to attorneys, marshals, or clerks of courts of the United States, their assistants or deputies. And all accounts of said attorneys, marshals and clerks, for mileage and for expenses incurred subsequent to the 1st day of July, 1874, and prior to the 1st day of January, 1875, shall and may be audited, allowed and

[1] The marshal is entitled to an allowance for maintaining persons committed to his custody, pending a writ of habeas corpus: Case of Runaways, 4 Cr. C. C. 489; for money expended for rent of an office for the clerk: United States *v.* Cogswell, 3 Sum. 204; and for interest on items which are properly chargeable against the government from the time of their rejection; but he is not authorized to charge for superintending a state prison where prisoners are kept for the United States; or for personal expenses incurred by him for the purpose of establishing and settling his accounts against the government: United States *v.* Cogswell, 3 Sum. 204; United States *v.* Smith, 1 W. & M. 184.

For a particular consideration of the duties of a marshal, see *ante*, § 19 *et seq.*

paid at the Treasury Department of the United States in the same manner as if said act had not been passed. And from and after the 1st day of January, 1875, no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law.

SEMI-ANNUAL RETURNS OF FEES TO BE MADE.—*Sec.* 833. Every district attorney, clerk of a district court, clerk of a circuit court, and marshal, shall on the first days of January and July in each year, or within thirty days thereafter, make to the Attorney-General, in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk-hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such returns the fees and emoluments received or payable under the bankrupt act; and every marshal shall state separately therein the fees and emoluments received or payable for services rendered by himself personally, those received or payable for services rendered by each of his deputies, naming him, and the proportion of such fees and emoluments which, by the terms of his service, each deputy is to receive. Said returns shall be verified by the oath of the officer making them. (See § 3085.)

WHAT TO BE INCLUDED IN THE SEMI-ANNUAL RETURN OF DISTRICT ATTORNEYS AND MARSHALS.—*Sec.* 834. The preceding section shall not apply to the fees and compensation allowed to district attorneys by sections 825 and 827. All other fees, charges and emoluments to which a district attorney or a marshal may be entitled by reason of the discharge of the duties of his office, as now or hereafter prescribed by law, or in any case in which the United States will be bound by the judgment rendered therein, whether prescribed by statute or allowed by a court or any judge thereof, shall be included in the semi-annual return required of said officers by the preceding section.

COMPENSATION OF DISTRICT ATTORNEY.—*Sec.* 835. No district attorney shall be allowed by the Attorney-General to retain of the fees and emoluments of his office which he is required to include in his semi-annual return, for his personal compensation, over and above the necessary expenses of his office, including necessary

clerk-hire, to be audited and allowed by the proper accounting officers of the Treasury Department, a sum exceeding six thousand dollars a year, or exceeding that rate for any time less than a year.[1]

SUM TO BE PAID DISTRICT ATTORNEY OF SOUTHERN NEW YORK FOR OFFICE EXPENSES.—*Sec.* 836. There shall be paid to the district attorney for the southern district of New York, in addition to his salary, at the rate of six thousand dollars a year, such sum as shall be necessary, together with the costs and fees allowed him by law, to pay such amount as may be fixed by the Attorney-General for the proper expenses of his office. But nothing in this or the preceding section shall forbid the allowance of additional compensation for services in prize causes, as provided in title "Prize."

FEES OF DISTRICT ATTORNEYS AND MARSHALS IN OREGON AND NEVADA.—*Sec.* 837. The district attorneys and marshals for the districts of Oregon and Nevada shall be entitled to receive, for the like services, double the fees hereinbefore provided; but neither of them shall be allowed to retain of such fees any sum exceeding the aggregate compensation of such officer as hereinbefore provided.

PROSECUTION FOR FRAUDS ON THE REVENUE.—*Sec.* 838 (as amended by act of Feb. 27, 1877, ch. 69, § 1, 19 Stat. 240). It shall be the duty of every district attorney to whom any collector of customs or of internal revenue shall report, according to law, any case in which any fine, penalty or forfeiture has been incurred in the district of such attorney for the violation of any law of the United States relating to the revenue, to cause the proper proceedings to be commenced and prosecuted without delay, for the fines, penalties and forfeitures in such case provided, unless, upon inquiry and examination, he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that such proceedings should be instituted; in which case he shall report the facts in customs cases to the Secretary of the Treasury, and in internal revenue cases to the Commissioner of Internal Revenue, for their direction. And for the expenses incurred and services rendered in all such cases, the district attorney shall receive and be paid from the treasury such sum as the Secre-

[1] The compensation of the district attorney is virtually a salary, where his fees are in excess of $6000; and the statute forbids any allowance for extra services: The Anna, Blatch. Pr. Cas. 337; United States *v.* Ingersoll, Crabbe 135.

tary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of; *provided*, that the annual compensation of such district attorney shall not exceed the maximum amount prescribed by law, by reason of such allowance and payment.

COMPENSATION RETAINED BY THE CLERK.—*Sec.* 839. No clerk of a district court or clerk of a circuit court shall be allowed by the Attorney-General, except as provided in the next section and in section 842, to retain of the fees and emoluments of his office, or, in case both of the said clerkships are held by the same person, of the fees and emoluments of the said offices respectively, for his personal compensation, over and above his necessary office expenses, including necessary clerk-hire, to be audited and allowed by the proper accounting officers of the treasury, a sum exceeding three thousand five hundred dollars a year for any such district clerk or for any such circuit clerk, or exceeding that rate for any time less than a year.

CLERKS IN CALIFORNIA, OREGON AND NEVADA, FEES.—*Sec.* 840. The clerks of the several circuit and district courts in California, Oregon and Nevada shall be entitled to charge and receive double the fees hereinbefore allowed to clerks, and shall be allowed respectively by the Attorney-General to retain of the fees so received by them for their personal compensation over and above the necessary expenses of their offices, including the salaries of deputy clerks and necessary clerk-hire, to be audited by the proper accounting officers of the Treasury Department, any sum not exceeding seven thousand dollars a year, nor exceeding that rate for any time less than a year; *provided*, that whenever in either of the said districts the same person holds the office of clerk of both the circuit and district courts, he shall be allowed by the Attorney-General to retain for his personal compensation, as aforesaid, only such sum as is herein allowed to be retained by a person holding the office of clerk of only one of the said courts.

COMPENSATION OF MARSHAL.—*Sec.* 841. No marshal shall be allowed by the Attorney-General, except as provided in the next section, to retain of the fees and emoluments which he is required to include in his semi-annual return, as aforesaid, for his personal compensation, over and above the necessary expenses of his office, including necessary clerk-hire, to be audited and allowed by the

proper accounting officers of the Treasury Department and a proper allowance to his deputies, any sum exceeding six thousand dollars a year, or exceeding that rate for any time less than a year. The allowance to any deputy shall in no case exceed three-fourths of the fees and emoluments received or payable for the services rendered by him, and may be reduced below that rate by the Attorney-General whenever the returns show such rate to be unreasonable.

ADDITIONAL COMPENSATION IN PRIZE CAUSES.—*Sec.* 842. Clerks and marshals may be allowed to retain, for all official services in prize causes, an additional compensation not exceeding in amount one-half of the maximum compensation allowed to them respectively by the three preceding sections.

ALLOWANCE FOR EACH YEAR MADE FROM THE FEES.—*Sec.* 843. The allowances for personal compensation of district attorneys, clerks and marshals, for each calendar year, shall be made from the fees and emoluments of that year, and not otherwise.

PAYMENT OF SURPLUS INTO THE TREASURY.—*Sec.* 844. Every district attorney, clerk and marshal shall, at the time of making his half-yearly return to the Attorney-General, pay into the treasury, or deposit to the credit of the Treasurer as he may be directed by the Attorney-General, any surplus of the fees and emoluments of his office, which said return shows to exist over and above the compensation and allowances authorized by law to be retained by him.

AUDITING ACCOUNTS OF DISTRICT ATTORNEY; DEPARTMENT OF JUSTICE.—*Sec.* 845. In every case where the return of a district attorney, clerk or marshal shows that a surplus may exist, the Attorney-General shall cause such returns to be carefully examined, and the accounts of disbursements to be regularly audited by the proper officer of his department, and an account to be opened with such officer in proper books to be provided for that purpose.

ACCOUNTS OF DISTRICT ATTORNEYS CERTIFIED BY DISTRICT JUDGE.—*Sec.* 846. The accounts of district attorneys, clerks, marshals and commissioners of circuit courts shall be examined and certified by the district judge of the district for which they are appointed, before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts; *provided*, that no accounts of fees or costs paid to any witness or juror, upon the order of any judge

or commissioner, shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs.

(As amended by act of Feb. 18, 1875, ch. 80, 18 Stat. 318.) That where the ministerial officers of the United States have or shall incur extraordinary expense in executing the laws thereof, the payment of which is not specially provided for, the President of the United States is authorized to allow the payment thereof under the special taxation of the district or circuit court of the district in which the said services have been or shall be rendered, to be paid from the appropriation for defraying the expenses of the judiciary.

The act of Feb. 22, 1875, ch. 95, § 1, 18 Stat. 333, provides: That before any bill of costs shall be taxed by any judge or other officer, or any account payable out of the money of the United States shall be allowed by any officer of the treasury, in favor of clerks, marshals or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States circuit or district court, and, in presence of the district attorney or his sworn assistant, whose presence shall be noted on the record, prove in open court, to the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts, to be attached to such account, that the services therein charged have been actually and necessarily performed as therein stated, and that the disbursements charged have been fully paid in lawful money; and the court shall thereupon cause to be entered of record an order approving or disapproving the account, as may be according to law and just. United States commissioners shall forward their accounts, duly verified by oath, to the district attorneys of their respective districts, by whom they shall be submitted for approval in open court, and the court shall pass upon the same in the manner aforesaid. Accounts and vouchers of clerks, marshals and district attorneys shall be made in duplicate, to be marked respectively "original" and "duplicate." And it shall be the duty of the clerk to forward the original accounts and vouchers of the officers above specified, when approved, to the proper accounting officers of the treasury, and to retain in his office the duplicates, where they shall be open to public inspection at all times. Nothing contained in this act shall be deemed in any wise to diminish or affect the right of revision of the accounts to which

this act applies by the accounting officers of the treasury, as exercised under the laws now in force.

The act of Feb. 22, 1875, ch. 95, § 5, 18 Stat. 334, provides: That if any clerk of any district or circuit court of the United States shall willfully refuse or neglect to make any report, certificate, statement or other document required by law to be by him made, or shall willfully refuse or neglect to forward any such report, certificate, statement or document to the department, officer or person to whom by law the same should be forwarded, the President of the United States is empowered, and it is hereby made his duty in every such case, to remove such clerk so offending from office by an order in writing for that purpose. And upon the presentation of such order, or a copy thereof, authenticated by the Attorney-General of the United States, to the judge of the court whereof such offender is clerk, such clerk shall thereupon be deemed to be out of office, and shall not exercise the functions thereof. And such district judge, in the case of the clerk of a district court, shall appoint a successor; and in the case of the clerk of a circuit court the circuit judge shall appoint a successor. And such person so removed shall not be eligible to any appointment as clerk or deputy clerk for the period of two years next after such removal.

The act of Feb. 22, 1875, ch. 95, § 6, 18 Stat. 334, provides: That if any clerk mentioned in the preceding section shall willfully refuse or neglect to make or to forward any such report, certificate, statement or document therein mentioned, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, in the discretion of the court; but a conviction under this section shall not be necessary as a condition precedent to the removal from office provided for in this act.

COMMISSIONERS' FEES.—*Sec.* 847. For administering an oath, ten cents.

For taking an acknowledgment, twenty-five cents.

For hearing and deciding on criminal charges, five dollars a day for the time necessarily employed.

For attending to a reference in a litigated matter in a civil cause at law, in equity or in admiralty, in pursuance of an order of the court, three dollars a day.

For taking and certifying depositions to file, twenty cents for each folio.

For each copy of the same furnished to a party on request, ten cents for each folio.

For issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services.

For issuing any warrant under the tenth article of the treaty of August 9, 1842, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any person charged with any crime or offence set forth in said article, two dollars.

For issuing any warrant under the provision of the convention for the surrender of criminals between the United States and the King of the French, concluded at Washington November 9, 1843, two dollars.

For hearing and deciding upon the case of any person charged with any crime or offence, and arrested under the provisions of said treaty or of said convention, five dollars a day for the time necessarily employed.

For the examination and certificate in cases of applications for discharge of poor convicts imprisoned for non-payment of a fine or fine and costs, five dollars a day for the time necessarily employed. (See § 1042.)

WITNESSES' FEES.—*Sec.* 848. For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. When a witness is subpœnaed in more than one cause between the same parties at the same court, only one travel fee and one per diem compensation shall be allowed for attendance. Both shall be taxed in the case first disposed of, after which the per diem attendance fee alone shall be taxed in the other cases in the order in which they are disposed of.

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of one dollar a day.[1] (See §§ 879, 881.)

[1] The term "pursuant to law" is held to apply to witnesses before commissioners only: Cummings *v.* The Akron C. and P. Co., 6 Blatch. 509. A witness is entitled to his fees although he may have been summoned to serve as a juror at the same term, and did so serve: Edwards *v.* Bond, 5

NO OFFICER OF COURT TO HAVE WITNESS FEES.—*Sec.* 849. No officer of the United States courts in any state or territory, or in the District of Columbia, shall be entitled to witness fees for attending before any court or commissioner where he is officiating.

EXPENSES OF CLERKS AND OTHER OFFICERS WHEN SENT AWAY AS WITNESSES.—*Sec.* 850. When any clerk or other officer of the United States is sent away from his place of business as a witness for the government, his necessary expenses, stated in items and sworn to, in going, returning and attendance on the court, shall be audited and paid; but no mileage, or other compensation in addition to his salary, shall in any case be allowed.

SEAMEN SENT HOME AS WITNESSES.—*Sec.* 851. There shall be paid to each seaman or other person who is sent to the United States from any foreign port, station, sea or ocean, by any United States minister, chargé d'affaires, consul, captain or commander, to give testimony in any criminal case depending in any court of the United States, such compensation, exclusive of subsistence and transportation, as such court may adjudge to be proper, not exceeding one dollar for each day necessarily employed in such

McLean 300; but a party who is called as a witness in his own behalf is not entitled to witness fees: Nichols *v.* Brunswick, 3 Cliff. 88. So, if the testimony of witnesses is taken by consent before a commissioner in another state, and their attendance before such commissioner for this purpose is voluntary, they are entitled to fees: Spaulding *v.* Tucker, 4 Fish 633; 2 Saw. 50. And it may be observed, generally, that a witness who attends in good faith and is examined before any officer pursuant to law, or before a court, is entitled to his fees, although he was not served with a subpœna; and the same may be taxed in a proper case against the adverse party: Dennis *v.* Eddy, 12 Blatch. 195. But if a witness is summoned in several cases, he is allowed a per diem and mileage only in one case, unless the parties are different; and this embraces all cases where the plaintiff is the same but the defendants are different: Parker *v.* Bigler, 1 Fish. 285; Parker *v.* Cartzler, 5 McLean 4.

If a witness is committed for want of a recognizance for his appearance, he is entitled to fees for the whole time he is detained: *In re* Eleanor Higginson, 1 Cr. C. C. 421; and if a case is postponed on account of the sickness of counsel, the fees of witnesses may be taxed for their actual attendance during the postponement: Whipple *v.* Cumberland Cotton Co., 3 Story 84. If a witness has means to pay his travelling expenses to obey a subpœna, it is not necessary to advance them before he is required to obey it: United States *v.* Darling, 4 Biss. 509; The Sunny Side, 5 Ben. 162.

In cases where the United States are successful and the fees are recovered from the defendant, they are not within the provisions of this section and cannot be recovered from the United States. The section refers to suits in which the United States were unsuccessful, and also to suits where services are required and no fees are taxed to the defendant: United States *v.* Cigars, 37 Leg. Int. 237.

voyage and in arriving at the place of examination or trial. In fixing such compensation, the court shall take into consideration the condition of said seaman or witness, and whether his voyage has been broken up, to his injury, by his being sent to the United States.

When such seaman or person is transported in an armed vessel of the United States, no charge for subsistence or transportation shall be allowed. When he is transported in any other vessel, the compensation for his transportation and subsistence, not exceeding in any case fifty cents a day, may be fixed by the court, and shall be paid to the captain of said vessel accordingly.

JURORS' FEES.—*Sec.* 852 (as amended by act of June 20, 1879, ch. 52, § 2, 21 Stat. 43). For actual attendance at any court or courts, and for the time necessarily occupied in going to and returning from the same, two dollars a day during such attendance.

For the distance necessarily travelled from their residence in going to and returning from said court by the shortest practicable route, five cents a mile.

The act of June 16, 1880, ch. 247, § 1, 21 Stat. 290, provides: That jurors and witnesses in the district and circuit courts of the United States in and for the state of Colorado shall be entitled to receive fifteen cents for each mile actually travelled in coming to or returning from said courts.

PRINTERS' FEES.—*Sec.* 853. For publishing any notice or order required by law, or the lawful order of any court, department, bureau or other person, in any newspaper, except as mentioned in sections 3823, 3824 and 3825, title "Public Printing, Advertisements and Public Documents," forty cents per folio for the first insertion and twenty cents per folio for each subsequent insertion. The compensation herein provided shall include the furnishing of lawful evidence, under oath, of publication, to be made and furnished by the printer or publisher making such publication.

MEANING OF THE TERM FOLIO.—*Sec.* 854. The term folio, in this chapter, shall mean one hundred words, counting each figure as a word. When there are over fifty and under one hundred words, they shall be counted as one folio; but a less number than fifty words shall not be counted except when the whole statute, notice or order contains less than fifty words.

The act of March 3, 1877, ch. 105, 19 Stat. 344, provides: And

there shall be taxed against the losing party in each and every cause pending in the Supreme Court of the United States, or in the Court of Claims of the United States, the cost of printing the record in such case, which shall be collected, except when the judgment is against the United States, by the clerks of said courts respectively, and paid into the treasury of the United States.

FEES OF WITNESSES; HOW PAID AND RECOVERED.—*Sec.* 855. In cases where the United States are parties, the marshal shall, on the order of the court, to be entered on its minutes, pay to the jurors and witnesses all fees to which they appear by such order to be entitled, which sum shall be allowed him at the treasury in his accounts.

OTHER FEES; HOW PAID.—*Sec.* 856. The fees of district attorneys, clerks, marshals and commissioners, in cases where the United States are liable to pay the same, shall be paid on settling their accounts at the treasury.

FEES; HOW RECOVERED.—*Sec.* 857. The fees and compensations of the officers and persons hereinbefore mentioned, except those which are directed to be paid out of the treasury, shall be recovered in like manner as the fees of the officers of the states respectively for like services are recovered.

CHAPTER XXIV.

PROVISIONS OF THE REVISED STATUTES RELATING TO EVIDENCE.

§ 525. **Witnesses, depositions, subpœnas, certificates, authentications and other matters relating to evidence.**—The Revised Statutes, as amended, provide in reference to evidence as follows:

NO WITNESS CAN BE EXCLUDED ON ACCOUNT OF COLOR.—*Sec.* 858. In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried; *provided*, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty.[1] (See § 1977.)

The act of March 16, 1878, ch. 37, 20 Stat. 30, provides: That in the trial of all indictments, informations, complaints and other

[1] This section applies as well to cases in which the United States are a party as to those between private persons: Green *v.* United States, 9 Wall. 655; and as well to a party who testifies on his own behalf as to cases where one party calls another to testify: Texas *v.* Chiles, 21 Wall. 488; Railroad Co. *v.* Pollard, 22 Wall. 341.

But the statute does not apply to territorial courts, as they are not courts of the United States: Good *v.* Martin, 95 U. S. 90. The section includes not only witnesses orally, but by deposition, who may give evidence without regard to interest or color: Cornet *v.* Williams, 20 Wall. 226.

A husband is a competent witness for a wife, and in an action by a husband and wife to recover damages for an injury to her, she is a competent witness if she is made so under the laws of the state: Green *v.* Taylor, 3 Hughes 400; Packet Co. *v.* Clough, 20 Wall. 528; *In re* Campbell, 3 Hughes 276.

At common law the reason for excluding a wife from testifying in favor of her husband did not rest upon the ground that she had an interest in the controversy, but upon grounds of public policy, and under this provision she cannot testify where she is a party to the suit, unless authorized to do so by the laws of the state: Id.; Lucas *v.* Brooks, 18 Wall. 436.

If a party dies after his evidence has been taken, the adverse party may be examined if the administrator of the deceased party insists upon using the depositions before the jury: Mumm *v.* Owens, 2 Dill. 475. See also The Pollard, 2 M. L. 16.

proceedings against persons charged with the commission of crimes, offences and misdemeanors, in the United States courts, territorial courts and courts-martial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.

TESTIMONY OF WITNESSES BEFORE CONGRESS; WHEN NOT ADMISSIBLE AGAINST THEM.—*Sec.* 859. No testimony given by a witness before either house or before any committee of either house of Congress shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege. (See § 103.)

WHEN PLEADINGS AND DISCLOSURES OF EVIDENCE CANNOT BE USED AGAINST A PARTY.—*Sec.* 860. No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; *provided*, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.[1]

MODE OF PROOF IN COMMON LAW ACTIONS.—*Sec.* 861. The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided.

MODE OF PROOF IN EQUITY AND ADMIRALTY.—*Sec.* 862. The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided.

[1] Notwithstanding the provisions of this section, the books and papers of a party which have been taken from him may be given in evidence against him in a criminal prosecution for the enforcement of a penalty or forfeiture: United States *v.* Hughes, 12 Blatch. 553; 8 Ben. 29; Barnes *v.* United States, 21 I. R. R. 212; United States *v.* Myers, 1 Hughes 533. But a defendant in an action for a penalty cannot be required to produce books and papers that will subject him to a penalty: Johnson *v.* Donaldson, 3 Fed. Rep. 22. See also United States *v.* Three Tons of Coal, 6 Biss. 379.

DEPOSITIONS DE BENE ESSE.—*Sec.* 863. The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition de bene esse, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases in rem, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record, or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.[1]

[1] NECESSARY CONDITIONS FOR TAKING AND READING.—A deposition de bene esse can only be taken where the following conditions exist:

1. When the witness lives more than one hundred miles from the place of trial;
2. Or is bound on a voyage to sea;
3. Or is about to go out of the United States;
4. Or is about to go out of the district to a greater distance than one hundred miles from the place of trial and before the time of trial;
5. Or is ancient and infirm.

And such a deposition can only be used upon the trial where it is shown—

1. That the witness is dead;
2. Or gone out of the United States;
3. Or to a greater distance than

MODE OF TAKING DEPOSITIONS DE BENE ESSE.—*Sec.* 864. Every person deposing as provided in the preceding section shall be cautioned and sworn to testify the whole truth, and carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or by himself in the magistrate's presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent.

TRANSMISSION TO THE COURT OF DEPOSITIONS DE BENE ESSE.—*Sec.* 865. Every deposition taken under the two preceding sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause.

DEPOSITIONS UNDER DEDIMUS POTESTATUM.—*Sec.* 866. In any case where it is necessary in order to prevent a failure or delay of justice, any of the courts of the United States may grant a dedimus potestatum to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may,

one hundred miles from the place of trial;

4. Or that by reason of age, sickness or bodily infirmity, he is unable to appear at court.

Harris *v.* Wall, 7 How. 693; The Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604; Wood *v.* Kellogg, 6 McLean 44; Bannert *v.* Day, 3 Wash. 243; Stein *v.* Bowman, 13 Pet. 209.

The authority to take depositions de bene esse is in derogation of the rules of the common law, and the statute on this subject is therefore strictly construed, so that depositions which have not been taken in strict accordance with the statute are inadmissible. And if depositions are taken in accordance with the prevalent practice of the state courts, which do not agree with the positive provisions of this statute and the rules of the federal courts, they are not admissible: Evans *v.* Eaton, 7 Wh. 356; Evans *v.* Hettick, 3 Wash. C. C. 408; Bell *v.* Morrison, 1 Pet. 351; Harris *v.* Wall, 7 How. 693; Allen *v.* Blunt, 2 W. & M. 121; Carrington *v.* Stimpson, 1 Curt. 437.

We have already considered the subject of depositions in connection with the treatment of the powers and duties of Commissioners of the Circuit Courts (see *ante*, ch. xix.), and hence we will make no further notes under this section and sections 864 and 865.

according to the usages of chancery, direct depositions to be taken in perpetuam rei memoriam, if they relate to any matters that may be cognizable in any court of the United States. And the provisions of sections 863, 864 and 865 shall not apply to any deposition to be taken under the authority of this section.[1]

DEPOSITIONS IN PERPETUAM REI MEMORIAM.—*Sec.* 867. Any court of the United States may, in its discretion, admit in evidence in any cause before it any deposition taken in perpetuam rei memoriam which would be so admissible in a court of the state wherein such cause is pending, according to the laws thereof.

SUBPŒNAS FOR TAKING TESTIMONY BY COMMISSION.—*Sec.* 868. When a commission is issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or territory, the clerk of any court of the United States for such district or territory shall, on the application of either party to the suit, or of his agent, issue a subpœna for such witness, commanding him to appear and testify before the commissioner named in the commission, at a time and place stated in the subpœna; and if any witness, after being duly served with such subpœna, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpœna, such judge may proceed to enforce obedience to the process or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpœna to testify issued by such court.

SUBPŒNAS DUCES TECUM.—*Sec.* 869. When either party in such suit applies to any judge of a United States court in such district

[1] This section, like all laws in derogation of the common law, should be strictly construed: United States *v.* Parrott, 1 McA. 447. The only mode in which a deposition can be taken in a foreign country is under a commission: Stein *v.* Bowman, 13 Pet. 209; Winthrop *v.* Union Ins. Co., 2 Wash. 7. A commission may issue in chancery suits although the witness lives within the distance of one hundred miles: Russell *v.* McLellan, 3 W. & M. 157; but a commission will not issue in a suit at law where the witness lives within that distance: Wellford *v.* Miller, 1 Cr. C. C. 485; Gustine *v.* Ringgold, 4 Cr. C. C. 191; Rhodes *v.* Selin, 4 Wash. 715.

THE COMMISSION MUST ISSUE FROM THE COURT.—This section provides that the commission may be granted by any of the courts of the United States; hence it cannot be granted by a judge at chambers: Peters *v.* Prevost, 1 Paine 64. And the commission is not grantable of course, but only upon a showing that the evidence is material: United States *v.* Parrott, 1 McA. 447; Sutton *v.* Manderville, 1 Cr. C. C. 115.

or territory for a subpœna commanding the witness, therein to be named, to appear and testify before said commissioner at the time and place to be stated in the subpœna, and to bring with him and produce to such commissioner any paper or writing or written instrument or book or other document, supposed to be in the possession or power of such witness, and to be described in the subpœna, such judge, on being satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpœna accordingly. And if the witness, after being served with such subpœna, fails to produce to the commissioner, at the time and place stated in the subpœna, any such paper, writing, written instrument, book or other document, being in his possession or power, and described in the subpœna, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpœna or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book or other document is produced to such commissioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties.

WITNESSES WHEN REQUIRED TO ATTEND, WHEN NOT.—*Sec.* 870. No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor shall any witness be deemed guilty of contempt for disobeying any subpœna directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day's attendance at, the place of examination are paid or tendered to him at the time of the service of the subpœna.[1]

[1] EXAMINATION UNDER COMMISSION. —All the interrogatories must be put to the witness or the deposition cannot be read: Winthrop *v.* Union Ins. Co., 2 Wash. C. C. 7; Richardson *v.* Goldsen, 3 Id. 109. The laws of the states as to practice in such cases are not binding upon the courts of the United States: Bell *v.* Davidson, 3 Wash. C. C. 328; Curtis *v.* The Central R. Co.,

DEPOSITIONS IN THE DISTRICT OF COLUMBIA TO BE USED ELSEWHERE.—*Sec.* 871. When a commission to take the testimony of any witness found within the District of Columbia, to be used in a suit depending in any state or territorial or foreign court, is issued from such court, or a notice to the same effect is given according to

6 McLean 401. The authority given the commissioner must be strictly pursued: Gupp *v.* Brown, 4 Dall. 410; Boudereau *v.* Montgomery, 4 Wash. 186. If a commission is issued to several parties, all must join in the return: Munns *v.* Dupont, 3 Wash. 31; Gupp *v.* Brown, 4 Dall. 410; Armstrong *v.* Brown, 1 Wash. 43.

NOTICE OF TIME AND PLACE FOR ORAL EXAMINATION.—If the application does not designate the time and place where depositions are to be taken, the party desiring them, or the commissioner, should give the opposite party notice thereof. See *post*, Equity Rule 67; Rhodes *v.* Selin, 4 Wash. 515; Knode *v.* Williamson, 17 Wall. 586; and the return of the officer should show that due notice was given, where that is required, and that the depositions were taken at the time and place designated: Id.; Boudereau *v.* Montgomery, 4 Wash. 186. The notice may be served on the opposite party or his attorney: Merrill *v.* Dawson, Hump. 563; s. c., 11 How. 375; and it may be served personally or by mail, or by leaving a copy with a member of the family at the residence of the opposite party: Id.; Walker *v.* Parker, 5 Cr. C. C. 639; and it must give a reasonable time for him to appear: Nicholls *v.* White, 1 Cr. C. C. 58; but a deposition taken by one party, without notice, may be read by the other party: Yeaton *v.* Fry, 5 Cr. C. C. 335. See also Shutte *v.* Thompson, 15 Wall. 151; York Company *v.* Central R. Co., 3 Id. 113.

EXECUTION OF COMMISSION UNDER EQUITY RULE 67.—The return should show that the commissioner took the oath annexed to the commission, unless the deposition is taken before a commissioner of the circuit court, in which case it is not necessary that this should appear: Winter *v.* Simonton, 3 Cr. C. C. 104; Hoyt *v.* Hammekin, 14 How. 346; Frewall *v.* Bache, 1 Cr. C. C. 463. The return of the commissioner is *prima facie* evidence of the facts stated therein in relation to the execution of the commission: Id.; Boudereau *v.* Montgomery, 4 Wash. 186.

WHERE WRITTEN INTERROGATORIES ARE FILED.—If a foreign commission is asked for, and in accordance with the general rules of practice in such cases interrogatories and cross interrogatories are filed, this would be a waiver of previous irregularities, and in such a case neither the parties nor their attorneys can appear before the commissioner on the examination, nor can the witness have a friend to assist him: Cunningham *v.* Otis, 1 Gallis. 166; Knode *v.* Williamson, 17 Wall. 586; Sargeant *v.* Biddle, 4 Wh. 508; Mechanics' Bank *v.* Seton, 1 Pet. 299.

WHAT THE RETURN SHOULD SHOW.—The return should show that the witness was duly sworn, but it is not necessary to set out the form of the oath: Jones *v.* Oregon Central R. Co., 3 Saw. 523; Keene *v.* Meade, 3 Pet. 1. The return need not show in whose handwriting the deposition was taken down: Id. But if exhibits are referred to by the witness, they should be annexed to the deposition and identified by marks or references to show they are the identical exhibits referred to by the witness: Dodge *v.* Israel, 4 Wash. 323.

When a deposition has been used without objection in the court below, it cannot be objected to on appeal or writ of error in the Supreme Court: Brown *v.* Tarkington, 3 Wall. 377; Vattier *v.* Hinde, 7 Pet. 252; The Samuel, 1 Wh. 9; Evans *v.* Hettich, 7 Id. 453.

For full directions as to the mode of procedure in taking depositions in equity causes, see *post*, Equity Rule No. 67.

its rules of practice, and such commission or notice is produced to a justice of the supreme court of said district, and due proof is made to him that the testimony of such witness is material to the party desiring the same, the said justice shall issue a summons to the witness, requiring him to appear before the commissioners named in the commission or notice, to testify in such suit, at a time and at a place within said district therein specified.

DEPOSITIONS WHEN TAKEN IN THE DISTRICT OF COLUMBIA WITHOUT PRESENCE OR CONSENT.—*Sec.* 872. When it satisfactorily appears by affidavit to any justice of the supreme court of the District of Columbia, or to any commissioner for taking depositions appointed by said court—

FIRST. That any person within said district is a material witness for either party in a suit pending in any state or territorial or foreign court;

SECOND. That no commission nor notice to take the testimony of such witness had been issued or given; and

THIRD. That, according to the practice of the court in which the suit is pending, the deposition of a witness taken without the presence and consent of both parties will be received on the trial or hearing thereof, such officer shall issue his summons, requiring the witness to appear before him at a place within the district, at some reasonable time, to be stated therein, to testify in such suit.

MANNER OF TAKING AND TRANSMITTING DEPOSITIONS IN SUCH CASES.—*Sec.* 873. Testimony obtained under the two preceding sections shall be taken down in writing by the officer before whom the witness appears, and shall be certified and transmitted by him to the court in which the suit is pending, in such manner as the practice of that court may require. If any person refuses or neglects to appear at the time and place mentioned in the summons, or, on his appearance, refuses to testify, he shall be liable to the same penalties as would be incurred for a like offence on the trial of a suit.

WITNESS FEES IN SUCH CASES.—*Sec.* 874. Every witness appearing and testifying under the said provisions relating to the District of Columbia shall be entitled to receive for each day's attendance, from the party at whose instance he is summoned, the fees now provided by law for each day he shall give attendance.

LETTERS ROGATORY FROM UNITED STATES COURTS.—*Sec.* 875. When any commission or letter rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have an interest, is executed by the court or the commissioner to whom it is directed, it shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where it was executed. On receiving the same, the said minister or consul shall indorse thereon a certificate stating when and where the same was received, and that the said deposition is in the same condition as when he received it; and he shall thereupon transmit the said letter or commission, so executed and certified, by mail, to the clerk of the court from which the same issued, in the manner in which his official dispatches are transmitted to the government. And the testimony of witnesses so taken and returned shall be read as evidence on the trial of the suit in which it was taken, without objection as to the method of returning the same. As amended by act of February 28, 1876, ch. 69, 19 Stat. 241. When letters rogatory are addressed from any court of a foreign country to any circuit court of the United States, a commissioner of such circuit court designated by such court to make the examination of the witnesses mentioned in said letter, shall have power to compel the witness to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts. (See §§ 4071–4074.)

SUBPŒNAS TO RUN INTO OTHER DISTRICTS.—*Sec.* 876. Subpœnas for witnesses who are required to attend a court of the United States, in any district, may run into any other district; *provided*, that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same.[1]

WITNESSES ON THE PART OF THE UNITED STATES—*Sec.* 877. Witnesses who are required to attend any term of a circuit or district court on the part of the United States shall be subpœnaed to attend to testify generally on their behalf, and not to depart court with-

[1] The distance a witness resides from the place of holding the court is to be determined not by an air line, but by the actual distance by the most convenient and usual routes: *Ex parte* Beebees, 2 Wall. Jr. 127. And if a witness living within another district, but not more than one hundred miles from the place of trial, has been duly subpœnaed, but fails to attend, the court may issue an attachment for him: United States *v.* Williams, 4 Cr. C. C. 372.

out leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney.

WITNESS ON BEHALF OF INDIGENT DEFENDANTS IN CRIMINAL CASES.—*Sec.* 878. Whenever any person indicted in a court of the United States makes affidavit, setting forth that there are witnesses whose evidence is material to his defence; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the court in term, or any judge thereof in vacation, may order that such witnesses be subpœnaed if found within the limits aforesaid. In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpœnaed in behalf of the United States.

RECOGNIZANCES OF WITNESSES IN CRIMINAL CASES.—*Sec.* 879. Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offence against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties in his discretion, for his appearance to testify in the case. And where the crime or offence is charged to have been committed on the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused whose testimony in his opinion is important and is in danger of being otherwise lost. (See §§ 848, 1014.)

RECOGNIZANCES IN THE DISTRICT OF VERMONT.—*Sec.* 880. In the district of Vermont all recognizances of witnesses taken by any magistrate in said district for their appearance to testify in any case cognizable either in the district or circuit court thereof shall be to the circuit court next thereafter to be held in the said district.

RECOGNIZANCES MAY BE REQUIRED AT ANY TIME BY DISTRICT ATTORNEY.—*Sec.* 881. Any judge of the United States, on the application of a district attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on

the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance with or without sureties, at his discretion, to appear to testify therein; and for that purpose may issue a warrant against such person under his hand, with or without seal, directed to the marshal or other officer authorized to execute process in behalf of the United States, to arrest and bring before him such person. If the person so arrested neglects or refuses to give recognizance in the manner required, the judge may issue a warrant of commitment against him, and the officer shall convey him to the prison mentioned therein. And the said person shall remain in confinement until he is removed to the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge. (See § 848.)

COPIES OF BOOKS AND OTHER PAPERS IN ANY EXECUTIVE DEPARTMENT.—*Sec.* 882. Copies of any books, records, papers or documents in any of the executive departments, authenticated under the seals of such departments respectively, shall be admitted in evidence equally with the originals thereof.[1]

[1] The term "papers or documents" in this section refers only to such documents as are made by an officer or agent of the government in the discharge of his official duty; and if it was not the duty of such officer or agent to file a paper or document in the department, an authenticated copy thereof would not be competent evidence: Block *v.* The United States, 7 Ct. Cl. 406.

If a party desires to use such paper or document as evidence in a suit against the United States, he must procure a certified copy, and cannot use a mere copy upon notice to the government to produce the original: Barney *v.* Schmeider, 9 Wall. 248; Chadwick *v.* United States, 3 Fed. Rep. 750.

WHAT IS SUFFICIENT AUTHENTICATION OF PAPERS OR DOCUMENTS.—The certificate of the Secretary of State, under the seal of his department, is competent evidence to prove the diplomatic character of a minister accredited to the United States and the time when he was recognized as such: United States *v.* Liddle, 2 Wash. 205; United States *v.* Beamer, Bald. 234. See also White *v.* St. Guirons, Minor 331; Catlett *v.* Pacific Ins. Co., 1 Paine 594; Bleecker *v.* Bond, 3 Wash. 529; Chadwick *v.* United States, 3 Fed. Rep. 750. But the mode of authentication prescribed by the statute must be strictly pursued: Block *v.* United States, 7 Ct. Cl. 406. Thus, a copy of an adjudication of a claim in the Treasury Department, certified by the Auditor, but without the seal of the department, is not competent evidence: Wickliffe *v.* Hill, 3 Litt. 330.

A copy of the bond of a collector of internal revenue authenticated by the Secretary of the Treasury, and under the seal of the Treasury Department, is competent evidence: Chadwick *v.* United States, 3 Fed. Rep. 750; and a quarterly return required to be made and filed in the department, duly certified by the Secretary, and under the seal of the department, is competent evidence: Id. So a certified copy of similar papers in the office of the Quartermaster, under his hand and the seal of the department, would be competent evidence.

COPIES AS EVIDENCE OF PAPERS IN THE OFFICE OF SOLICITOR OF TREASURY.—*Sec.* 883. Copies of any documents, records, books or papers in the office of the Solicitor of the Treasury, certified by him under the seal of his office, or, when his office is vacant, by the officer acting as Solicitor for the time, shall be evidence equally with the originals.

PAPERS EXECUTED BY THE COMPTROLLER OF THE CURRENCY.—*Sec.* 884. Every certificate, assignment and conveyance executed by the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer.

CERTIFICATES OF ORGANIZATION OF NATIONAL BANKS.—*Sec.* 885. Copies of the organization certificate of any national banking association, duly certified by the Comptroller of the Currency, and authenticated by his seal of office, shall be evidence in all courts and places within the jurisdiction of the United States of the existence of the association, and of every matter which could be proved by the production of the original certificate. (See § 5135.)

TRANSCRIPTS OF BOOKS OF THE TREASURY.—*Sec.* 886. When suit is brought in any case of delinquency of a revenue officer or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the Register and authenticated under the seal of the department, or, when the suit involves the accounts of the War or Navy Departments, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the Treasury Department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts or other papers relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the Register, or by such Auditor, as the case may be,

If an officer having charge of a paper certifies that a paper is a true copy of the original, and the head of the department certifies as to the official character of the former under his hand and seal of office, the paper is properly authenticated: Thompson *v.* Smith, 2 Bond 320; Crowell *v.* Hopkinton, 45 N. H. 9.

to be true copies of the originals on file, and authenticated under the seal of the department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court; *provided*, that where a suit is brought upon a bond or other sealed instrument, and the defendant pleads "non est factum," or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract or other paper specified in such affidavit.[1]

TRANSCRIPTS OF BOOKS OF TREASURY IN CASE OF EMBEZZLEMENT. —*Sec.* 887. Upon the trial of any indictment against any person for embezzling public moneys, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury Department, as provided by the preceding section.

[1] This section extends to any case of delinquency on the part of any person accountable for public money: Bechtel *v.* United States, 597; and it applies to sureties of such persons as well as to the defaulting principal: United States *v.* Gaussen, 19 Wall. 198. See also Chadwick *v.* United States, 3 Fed. Rep. 750; United States *v.* Eggleston, 4 Saw. 199; Soule *v.* United States, 100 U. S. 8; Walton *v.* United States, 9 Wh. 651; United States *v.* Eckford, 1 How. 250; but a certified transcript from the books and proceedings of the Treasury Department is only *prima facie* evidence of the facts stated therein, so far as the same are authorized by law; and any error therein may be corrected: Id. An authenticated transcript from the books is competent *prima facie* evidence to show that an officer received the money charged against him, and need not be accompanied by authenticated copies of his receipts: Bruce *v.* United States, 17 How. 437. See also United States *v.* Jones, 8 Pet. 375; United States *v.* Martin, 2 Paine 68; United States *v.* Kuhn, 4 Cr. (C. C.) 401. The transcript is also *prima facie* evidence of the capacity in which the officer acted: Smith *v.* United States, 5 Pet. 292; but the officers of the Treasury Department cannot certify to matters that do not come within official knowledge: United States *v.* Jones, 8 Pet. 375; United States *v.* Kuhn, 4 Cr. (C. C.) 401.

A transcript or copy of books, or a portion of them, duly authenticated by the proper head of a department, and under its seal, is competent evidence: United States *v.* Buford, 3 Pet. 12; United States *v.* Jones, 8 Pet. 375; United States *v.* Gaussen, 19 Wall. 198.

The statement of a gross amount contained in a transcript is not competent evidence thereof, but it should contain a statement of the items of the account on both sides, both the debits and the credits, as they were acted upon by the accounting officers of the government: Id.; United States *v.* Edward, 1 McLean 467; United States *v.* Vanzandt, 2 Cr. (C. C.) 338; Gratiot *v.* United States, 15 Pet. 336; Hoyt *v.* United States, 10 How. 109; *Ex parte* Randolph, 2 Brock 447; United States *v.* Collier, 3 Blatch. 325.

COPIES OF RETURNS IN RETURN OFFICE.—*Sec.* 888. A copy of any return of a contract returned and filed in the returns-office of the Department of the Interior, as provided by law, when certified by the clerk of the said office to be full and complete, and when authenticated by the seal of the department, shall be evidence in any prosecution against any officer for falsely and corruptly swearing to the affidavit required by law to be made by such officer in making his return of any contract, as required by law, to said returns-office. (See § 3744.)

COPIES OF POST-OFFICE RECORDS AND OF AUDITOR'S STATEMENT. —*Sec.* 889. Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the Sixth Auditor, and transcripts from the money-order account-books of the Post-Office Department, when certified by the Sixth Auditor, under the seal of his office, shall be admitted as evidence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits.

COPIES OF STATEMENTS BY POST-OFFICE DEPARTMENT.—*Sec.* 890. In all suits for the recovery of balances due from postmasters, a copy, duly certified under the seal of the Sixth Auditor, of the statement of any postmaster, special agent or other person employed by the Postmaster-General or the Auditor for that purpose, that he has mailed a letter to such delinquent postmaster at the post-office where the indebtedness accrued, or at his last usual place of abode; that a sufficient time has elapsed for said letter to have reached its destination in the ordinary course of the mail; and that payment of such balance has not been received, within the time designated in his instructions, shall be received as sufficient evidence in the courts of the United States, or other courts, that a demand has been made upon the delinquent postmaster; but when the account of a late postmaster has been once adjusted and settled and a demand has been made for the balance appearing to be due, and afterward allowances are made or credits entered, it shall not be necessary to make a further demand for the new balance found to be due.

COPIES OF RECORDS OF GENERAL LAND-OFFICE.—*Sec.* 891. Copies of any records, books or papers in the General Land-Office, authenticated by the seal and certified by the Commissioner thereof or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record.[1] (See §§ 2469, 2470.)

COPIES OF RECORD OF PATENT-OFFICE.—*Sec.* 892. Written or printed copies of any records, books, papers or drawings belonging to the Patent-Office, and of letters patent, authenticated by the seal and certified by the Commissioner or acting Commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor and paying the fee required by law shall have certified copies thereof.[2]

COPIES OF FOREIGN LETTERS PATENT.—*Sec.* 893. Copies of the specifications and drawings of foreign letters patent, certified as provided in the next preceding section, shall be *prima facie* evidence of the fact of the granting of such letters patent and of the date and contents thereof.

COPIES OF SPECIFICATIONS AND DRAWINGS CERTIFIED BY COMMISSIONER OF PATENTS.—*Sec.* 894. The printed copies of specifications and drawings of patents which the Commissioner of Patents is authorized to print for gratuitous distribution and to deposit in

[1] This section does not dispense with the signing and countersigning of a patent for lands; as this must be signed by the President and countersigned by the recorder: McGarrahan *v.* Mining Co., 96 U. S. 316. See also Hanrick *v.* Barton, 16 Wall. 166.

A copy of a plot and description, duly authenticated by a certificate of the Commissioner of the Land-Office under his seal of office, is competent evidence: Harris *v.* Barnett, 4 Black 369.

[2] Under this section a transcript of certain documents on file in the Patent-Office is competent evidence, although it does not purport to be a copy of the whole: Toohey *v.* Harding, 1 Fed. Rep. 174.

Patents are public records, and consequently all persons have a right to obtain copies of them. As these records are in the care and custody of the Commissioner of Patents, it is his duty to give authenticated copies of the same to any person who shall demand it and pay or tender the fees therefor, as soon as he can conveniently; and a failure to do so subjects the Commissioner to an action for damages sustained thereby. But a demand accompanied by insolence, rudeness and insult is not a legal demand: Bayden *v.* Burke, 14 How. 575. See also Davis *v.* Grey, 17 Oh. St. 335; Sherman *v.* Champlain Co., 31 Vt. 162; Stone *v.* Palmer, 28 Mo. 539; Stoner *v.* Ellis, 6 Ind. 152; Bullock *v.* Wallingford, 55 N. H. 619.

the capitals of the states and territories and in the clerks' offices of the district courts shall, when certified by him and authenticated by the seal of his office, be received in all courts as evidence of all matters therein contained.

EXTRACTS OF JOURNALS OF CONGRESS.—*Sec.* 895. Extracts from the journals of the Senate or of the House of Representatives, and of the executive journal of the Senate when the injunction of secrecy is removed, certified by the Secretary of the Senate or by the Clerk of the House of Representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court.

COPIES OF RECORDS IN OFFICE OF UNITED STATES CONSUL.—*Sec.* 896. Copies of all official documents and papers in the office of any consul, vice-consul or commercial agent of the United States, and of all official entries in the books or records of any such office, certified under the hand and seal of such officer, shall be admitted in evidence in the courts of the United States.[1] (See § 1707.)

TRANSCRIPTS CERTIFIED BY THE CLERKS OF DISTRICT COURTS IN TEXAS, FLORIDA, WISCONSIN AND OTHER STATES.—*Sec.* 897. The transcripts into new books made by the clerks of the district courts in the several districts of Texas, Florida, Wisconsin, Minnesota, Iowa and Kansas, in pursuance of the act of June 27, 1864, chapter 165, from the record and journals transferred by them respectively, under the same act, to the clerks of the circuit courts in said districts, when certified by the clerks respectively making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the cer-

[1] The certificate of a consul is not evidence of any matter not within the provisions of this section, as its provisions are in derogation of the common law rules of evidence and therefore must be strictly construed: Levy *v.* Burley, 2 Sum. 355. But the certificate of a consul is competent to prove his official acts: Brown *v.* The Independence, Crabbe 54; and that a ship's papers were lodged with him: United States *v.* Mitchell, 2 Wash. 478; and that a seaman was discharged in a foreign port by his own consent: Lamb *v.* Briard, Abb. Ad. 367. But a consul's certificate is not competent evidence to prove acts that are not his official acts and of which he has no personal knowledge: Brown *v.* The Independence, Crabbe 54; or to prove the facts to justify an imprisonment of a seaman by a master in a foreign port: Johnson *v.* The Coriolanus, Crabbe 239; or the refusal of a master of a vessel to deposit the register of the departure or arrival of a vessel: Levy *v.* Burley, 2 Sum. 355; or that a paper is a true copy of a foreign statute: Church *v.* Hubert, 2 Cr. 187.

tificates of the clerks of said circuit courts respectively of transcripts of any of the books or papers so transferred to them, shall be received in evidence with the like effect as if made by the clerk of the court in which the proceedings were had.

TRANSCRIBED RECORDS CERTIFIED BY CLERKS IN NORTH CAROLINA.—*Sec.* 898. The transcripts into new books made by the clerks of the circuit and district courts for the western district of North Carolina, in pursuance of the act of June 4, 1872, chapter 282, when certified by the clerks respectively making the same to be full and true copies from the original books, shall have the same force and effects as records as the originals. And the certificates of the clerks of said circuit and district courts respectively, of transcripts of any of the said transcribed records, shall also be received in evidence with the like effect as if made by the proper clerk from the originals from which such records were transcribed.

WHEN ORIGINAL RECORDS ARE LOST OR DESTROYED.—*Sec.* 899. When the record of any judgment, decree or other proceedings of any court of the United States is lost or destroyed, any party or person interested therein may, on application to such court and on showing to its satisfaction that the same was lost or destroyed without his fault, obtain from it an order authorizing such defect to be supplied by a duly certified copy of the original record, where the same can be obtained; and such certified copy shall thereafter have, in all respects,, the same effect as the original record would have had.

SAME SUBJECT.—*Sec.* 900. When any such record is lost or destroyed, and the defect cannot be supplied as provided in the preceding section, any party or person interested therein may make a written application to the court to which the record belonged, verified by affidavit, showing such loss or destruction; that the same occurred without his fault or neglect; that certified copies of such record cannot be obtained by him; and showing also the substance of the record so lost or destroyed, and that the loss or destruction thereof, unless supplied, will or may result in damage to him. The court shall cause said application to be entered of record, and a copy of it shall be served personally upon every person interested therein, together with written notice that on a day therein stated, which shall not be less than sixty days after such service, said application will be heard; and if, upon such hearing, the court is

satisfied that the statements contained in the application are true, it shall make and cause to be entered of record an order reciting the substance and effect of said lost or destroyed record. Said order shall have the same effect, so far as concerns the party or person making such application and the persons served as above provided, but subject to intervening rights, which the original record would have had if the same had not be lost or destroyed.

SAME SUBJECT.—*Sec.* 901. When any cause has been removed to the Supreme Court, and the original record thereof is afterward lost, a duly certified copy of the record remaining in said court may be filed in the court from which the cause was removed, on motion of any party or person claiming to be interested therein; and the copy so filed shall have the same effect as the original record would have had if the same had not been lost or destroyed.

SAME SUBJECT.—*Sec.* 902 (as amended by act of January 31, 1879, ch. 39, § 1, 20 Stat. 277). In any proceedings in conformity with law to restore the records of any court of the United States which have been or may be hereafter lost or destroyed, the notice required may be served on any non-resident of the district in which such court is held anywhere within the jurisdiction of the United States or in any foreign country; the proof of service of such notice, if made in a foreign country, to be certified by a minister or consul of the United States in such country, under his official seal.

RECORDS IN CASE OF LOSS.—*Sec.* 903 (as amended by act of January 31, 1879, ch. 39, § 2, 20 Stat. 277). A certified copy of the official return, or any other official paper of the United States attorney, marshal or clerk or other certifying or recording officer of any court of the United States, made in pursuance of law, and on file in any department of the government, relating to any cause or matter to which the United States was a party in any such court, the record of which has been or may be lost or destroyed, may be filed in the court to which it appertains, and shall have the same force and effect as if it were an original report, return, paper or other document made to or filed in such court; and in any case in which the names of the parties and the date and amount of judgment or decree shall appear from such return, paper or document, it shall be lawful for the court in which they are filed to issue the proper process to enforce such decree or judgment, in the same manner as if the original record remained in the said court. And

in all cases where any of the files, papers or records of any court of the United States have been or shall be lost or destroyed, the files, records and papers which, pursuant to law, may have been or may be restored or supplied in place of such records, files and papers, shall have the same force and effect, to all intents and purposes, as the original thereof would have been entitled to.

SEC. 904 (as amended by act of January 31, 1879, ch. 39, § 3, 20 Stat. 278). That whenever any of the records or files in which the United States are interested in any court of the United States have been or may be lost or destroyed, it shall be the duty of the attorney of the United States for the district or court to which such files and records belong, so far as the judges of such courts respectively shall deem it essential to the interests of the United States that such records and files be restored or supplied, to take such steps, under the direction of said judges, as may be necessary to effect such restoration or substitution, including such dockets, indices and other books and papers as said judges shall think proper. Said judges may direct the performance, by the clerks of said courts respectively and by the United States attorneys, of any duties incident thereto; and said clerks and attorneys shall be allowed such compensation for services in the matter and for lawful disbursements as may be approved by the Attorney-General of the United States, upon a certificate by the judges of said courts stating that such claim for services and disbursements is just and reasonable; and the sum so allowed shall be paid out of the judiciary fund.

AUTHENTICATION OF LEGISLATIVE PROCEEDINGS AND PROOF OF JUDICIAL PROCEEDINGS.—*Sec.* 905. The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within

the United States as they have by law or usage in the courts of the state from which they are taken.[1]

[1] ACTS OF THE LEGISLATURE OF ANY STATE, TERRITORY OR COUNTRY.—The mode of authentication prescribed by this section is not exclusive of any which the states may adopt. A state may provide for the authentication of the records of another state, and require less proof than prescribed by this section: Kingman *v.* Cowles, 103 Mass. 283; Latterett *v.* Cook, 1 Ia. 1; Parker *v.* Williams, 7 Cal. 247; Ordway *v.* Conroe, 4 Wis. 45; Lothrop *v.* Blake, 3 Penn. 483; Goodwyn *v.* Goodwyn, 25 Ga. 203; Kean *v.* Rice, 12 S. & R. 203.

Printed copies of statutes with interlineations may be used if duly authenticated: United States *v.* Amedy, 11 Wh. 392; and it seems that an exemplification of an act of the legislature under the seal of the state is sufficient without an attestation by any state officer: Id.; United States *v.* Johns, 4 Dall. 412; 1 Wash. 363; Grant *v.* Henry Clay Coal Co., 80 Penn. 208.

But a pamphlet with no seal attached to it is not competent evidence of the law of another state: Craig *v.* Brown, 1 Pet. C. C. 352.

But the federal courts will take notice of the public laws of the states: Owing *v.* Hull, 9 Pet. 607; McNiel *v.* Holbrook, 12 Pet. 84; Mewster *v.* Spalding, 6 McLean 24; Jones *v.* Hayes, 4 McLean 521; Drawbridge Co. *v.* Shepherd, 20 How. 227; Harpending *v.* Reformed Dutch Church, 16 Pet. 455.

THE SEAL.—A seal, within the meaning of the statute, is an impression upon wax, wafer or some other tenacious substance, and an impression upon the paper only is not a seal: Coit *v.* Millikin, 1 Den. 376. If there is no seal attached to an exemplified record, nor certificate that the court has no seal, it is not competent evidence: McFarlane *v.* Harrington, 2 Bay 554; Allen *v.* Thaxter, 1 Blackf. 399; but a transcript is admissible, though the clerk certifies that he affixes his seal of office instead of the seal of the court: McLean *v.* Winchester, 17 Mo. 49; Coffie *v.* Neely, 2 Heisk. 304; Clark *v.* Depew, 25 Penn. 409; and if the clerk affixes his private seal and certifies the court has no seal, the private seal will not vitiate the certificate: Flourenoy *v.* Duke, 2 Brev. 256; Strade *v.* Churchill, 2 Litt. 75.

The fact that the court whose record is certified has no seal should be shown either in the certificate of the clerk or the judge, and if the attestation of the clerk recites that there is no seal, the certificate of the judge that the attestation is in due form is sufficient: Simons *v.* Cook, 29 Ia. 324; Craig *v.* Brown, 1 Pet. C. C. 352.

RECORDS—APPLICATION OF STATUTE.—The statute has no application to the records of the federal courts, but is limited to the records of the courts of any state or territory or country subject to the jurisdiction of the United States: Mason *v.* Laurason, 1 Cr. C. C. 190; Dean *v.* Chapin, 22 Mich. 275; Adams *v.* Way, 33 Conn. 419; Williams *v.* Wilkes, 14 Penn. 228; Adams *v.* Lesher, 2 Blackf. 241; Dorsey *v.* Maury, 18 Miss. 298; Steere *v.* Tenney, 50 N. H. 461.

The statute has application only to courts of record; courts of justices of the peace are not generally courts of record, but may be so under local statutes. If they are made courts of record by statute, the statute should be produced and proved, or the certified record of his court will not be competent evidence: Thomas *v.* Robinson, 3 Wend. 267; Kean *v.* Rice, 12 S. & R. 203; Gay *v.* Lloyd, 1 Greene (Ia.) 78; Pelton *v.* Platner, 13 Ohio 209; Draggoo *v.* Graham, 9 Ind. 212; Silver Lake Bk. *v.* Harding, 5 Ohio 545; Warren *v.* Flagg, 19 Mass. 448; Ault *v.* Zehering, 38 Ind. 429.

If a justice holds a court of record he is competent to certify a record of his court, although he may have no clerk or seal, and is not only the presiding magistrate but the clerk. In

PROOFS OF RECORDS IN OFFICES NOT APPERTAINING TO COURTS. —*Sec.* 906. All records and exemplifications of books, which may

such a case he may certify that he is the presiding magistrate and clerk and that he has no seal, and that the attestation is in due form, and subscribe it as justice of the peace: Bissel *v.* Edwards, 5 Day 363; Blodget *v.* Jordan, 6 Vt. 580; Brown *v.* Edson, 23 Vt. 435; Starkweather *v.* Loomis, 2 Vt. 573; Scott *v.* Cleveland, 3 Mon. 62.

COMPETENT EVIDENCE IN THE FEDERAL COURTS.—The records and proceedings of the state courts, duly authenticated, are competent evidence in all federal courts: Mills *v.* Duryee, 7 Cr. 481; Galpin *v.* Page, 3 Saw. 93; United States *v.* Biebusch, 1 Fed. Rep. 213; Pennoyer *v.* Neff, 95 U. S. 714; and the transcript of a state court, properly certified by the clerk under the seal of the court, is admissible in a federal court sitting in the same state without a certificate of the judge that it is in due form: Mewster *v.* Spalding, 6 McLean 24. The provision is also applicable to the federal courts in the District of Columbia: Mills *v.* Duryee, 7 Cr. 481.

RECORDS AND PROCEEDINGS THAT MAY BE AUTHENTICATED.—If a record purports to be a confession of a judgment before the clerk of a state court, it is within the provision of this section: Sipes *v.* Whitney, 30 Ohio St. 69; Randolph *v.* Kesler, 21 Mo. 557; Coleman *v.* Waters, 12 W. Va. 278.

The decree of a court of chancery: Patrick *v.* Gibbs, 17 Tex. 275; or a judgment to enforce a vendor's lien: Seaborn *v.* Henry, 30 Ark. 469; or for the maintenance of a bastard child: State *v.* Helmer, 21 Ia. 370; or on a bond of recognizance, Spencer *v.* Brockway, 1 Ohio 260; or for a penalty: Healy *v.* Root, 28 Mass. 389, may be certified under the provisions of this statute. So may the proceeds of probate courts: First Nat. Bk. *v.* Kidd, 20 Min. 234; Bright *v.* White, 8 Mo. 421; Haile *v.* Hill, 13 Mo. 612; Hauze *v.* Hauze, 16 Tex. 598; Melvin *v.* Lyons, 18 Miss. 78; Slack *v.* Walcott, 3 Mass. 508; Case *v.* McGee, 8 Md. 9; Doe *v.* Doe, 31 Ga. 593; Lee *v.* Hamilton, 3 Ala. 529; Robertson *v.* Barbour, 6 Mon. 523; but unless a guardian's bond is a matter of record in the probate court, it cannot be authenticated so as to be evidence under this section: Carlisle *v.* Tuttle, 30 Ala. 613. See also Martin *v.* Martin, 22 Ala. 86; Russel *v.* Kearney, 27 Geo. 96; Warren *v.* Wade, 7 Jones (N. C.) 494; Pickett *v.* Bates, 3 La. An. 627.

The decision of a commissioner is not a judgment of a court, although he is an officer of it: Taylor *v.* Barron, 30 N. H. 78; but if his decision is accepted and recorded by the court as its judgment, it may be authenticated under this statute: Taylor *v.* Barron, 35 N. H. 484.

THE CLERK'S CERTIFICATE.—If the record is not properly attested and certified it cannot be used as evidence: Craig *v.* Brown, 1 Pet. C. C. 352; Bissel *v.* Edwards, 5 Day 363; Barrow *v.* Steel, 65 Mo. 611.

The statute does not prescribe the form of the attestation or certificate, but the form is immaterial where there is a judge's certificate: Horner *v.* Spilman, 78 Ill. 206; White *v.* Strother, 11 Ala. 720; Thompson *v.* Manrow, 1 Cal. 428.

The law does not require that the clerk shall certify the transcript as a full one of the whole proceedings, and if the certificate states that the transcript is truly copied from the record of the proceedings of the court, when it appears to be a complete record of a suit from the commencement to the termination of the suit, it will be sufficient: Mudd *v.* Beauchamp, Litt. Sel. Cas. 142; Reber *v.* Wright, 68 Penn. 471; Clark *v.* Depew, 25 Penn. 409. And the truth of the matters certified cannot be contradicted: McCormic *v.* Deaver, 22 Md. 187.

THE JUDGE'S CERTIFICATE.—It is necessary that there be a certificate of the presiding judge that the attestation is in due form, and if there is no such certificate the exemplification is

be kept in any public office of any state or territory, or of any country subject to the jurisdiction of the United States, not apper-

not competent evidence. The mode of attestation of records and proceedings of courts in the various states to make them competent evidence is usually prescribed by the statutes of the several states, and the section under consideration requires the mode of attestation for this purpose to conform to that used in the state where the court was held and not to the forms used in the state where it is offered: Duncommon *v.* Hysinger, 14 Ill. 14; Craig *v.* Brown, 1 Pet. C. C. 352; White *v.* Strother, 11 Ala. 720; Thrasher *v.* Ingram, 32 Ala. 645; Snyder *v.* Wise, 10 Penn. 157; Ordway *v.* Conroe, 4 Wis. 45; Brackett *v.* People, 64 Ill. 170; Corfield *v.* Coryell, 4 Wash. C. C. 371; Pepin *v.* Lachenmyer, 45 N. Y. 27; Hackett *v.* Bonnell, 16 Wis. 471; Washabaugh *v.* Entriken, 34 Penn. 74; Hutchins *v.* Gerrish, 52 N. H. 205; Trigg *v.* Conway, Hem. 538.

The certificate should show that he was the presiding judge of the court where the proceedings took place: Little *v.* Alison, 8 Geo. 201; Pratt *v.* King, 1 Ore. 49; Brown *v.* Johnson, 42 Ala. 208; Taylor *v.* Kilgore, 33 Ala. 214; Bennett *v.* Bennett, 1 Deady 300; Erb *v.* Scott, 14 Penn. 20; Hatcher *v.* Rocheleau, 18 N. Y. 86; Barlow *v.* Steel, 65 Mo. 611; Thrasher *v.* Ingram, 32 Ala. 645; Newman *v.* Goza, 14 La. An. 642; Haynes *v.* Cowen, 11 Kans. 637.

Effect of an authenticated record of a judgment as evidence.—If the record of a judgment is proved in the manner prescribed by the statute, the evidence is of as high a nature as the inspection of the same record or as an exemplification of the record would be in any other court of the same state: Mills *v.* Duryee, 7 Cr. 481; Green *v.* Sarmiento, 3 Wash. 17; s. c., 1 Pet. C. C. 74; Public Works *v.* Columbia College, 17 Wall. 521; McElmoyle *v.* Cohen, 13 Pet. 312. But if the judgment would not be valid under the laws of the state where it is offered in evidence, it cannot be deemed valid unless it is shown to be so by proof of the laws of the state where it was rendered: Crafts *v.* Clark, 31 Ia. 77. See also McFarland *v.* White, 13 La. An. 394; Porcheller *v.* Bronson, 50 Tex. 555; Newton *v.* Mutual Benefit Life Ins. Co., 22 N. Y. 595.

If a judgment by confession under a power of attorney may be set aside in the state where it was rendered, it may be examined and annulled in another state: Brown *v.* Parker, 28 Wis. 21. So if a judgment would not be a bar to a subsequent action in the same state, it would not be a bar to an action in another state: Matoon *v.* Clapp, 8 Ohio 248.

If a judgment against a corporation cannot be enforced against stockholders individually in the state where it was rendered, it cannot bind them in another state where a judgment could be so enforced: Sumner *v.* Marcy, 3 W. & M. 105. See also Killam *v.* Toms, 38 Wis. 592; Oldens *v.* Hallett, 5 N. J. 466; Sims *v.* Sims, 75 N. Y. 466; Commonwealth *v.* Green, 17 Mass. 514.

Judgments are conclusive between the parties in every state except for such causes as would be sufficient to set aside the judgment in the state where it was rendered: McElmoyle *v.* Cohen, 13 Pet. 312; Green *v.* Sarmiento, 3 Wash. 17; Mills *v.* Duryee, 7 Cr. 481; Belton *v.* Fisher, 44 Ill. 32; Wheeler *v.* Raymond, 8 Cow. 311; Robert *v.* Hodges, 16 N. J. Eq. 299.

Efficacy of a judgment in another state.—A judgment in one state cannot carry with it into another state any efficacy as a judgment to be enforced by execution. When duly authenticated, it is only the evidence of an indebtedness and the ground for another judgment in the forum of another state, which can only be enforced by execution under the laws of the latter state: McElmoyle *v.* Cohen, 13 Pet. 312; Beale *v.* Berryman, 30 N. J. 216; McLure *v.* Bencene, 2 Ired. Eq. 513; Carter *v.* Bennett, 6 Fla. 214; Harness *v.*

taining to a court, shall be proved or admitted in any court or office in any other state or territory, or in any such country, by

Green, 20 Mo. 316; Barrett *v.* Failing, 3 Fed. Rep. 471.

APPEAL OR WRIT OF ERROR.—The judgment of the inferior court is presumed to remain unreversed until the contrary is shown: Schoonmaker *v.* Lloyd, 9 Rich. 173; and the pendency of a writ of error or appeal where no bond is given to stay proceedings constitutes no defence to an action on the judgment in another state: McJilton *v.* Love, 13 Ill. 486; McArthur *v.* Goddin, 12 Bush. 274; DeWolf, 33 Penn. 45. See also Paine *v.* Schenectady Ins. Co., 11 R. I. 411; Bank *v.* Wheeler, 28 Conn. 433.

WHERE A DECREE WAS MERELY INTERLOCUTORY.—If a decree was merely interlocutory under the laws of the state where it was rendered, it will be so considered in another state: Public Works *v.* Columbia College, 17 Wall. 521; Whitaker *v.* Bramson, 2 Paine 209. But a judgment which on its face purports to be a final judgment will in the absence of evidence to the contrary be treated as a final one in another state: Rowland *v.* Jarvis, 5 La. An. 43. See also Lawrence *v.* Jarvis, 32 Ill. 125.

DECREES IN RELATION TO LAND IN ANOTHER STATE.—No decree in one state can operate as a conveyance of land in another; nor will a conveyance of a commissioner appointed under a decree of a court in one state divest a legal title to real estate in another state: Watts *v.* Waddle, 1 McLean 200; s. c., 6 Pet. 389; Tardy *v.* Morgan, 3 McLean 358; Burnley *v.* Stevenson, 24 Ohio St. 474; see also Davis *v.* Headley, 22 N. J. 115.

WHERE THE COURT HAD JURISDICTION OF A CAUSE THE JUDGMENT CANNOT BE IMPEACHED COLLATERALLY FOR ERRORS AND IRREGULARITIES.—It is a general principle of the law that where a court had jurisdiction in a cause both of the persons and the subject-matter a judgment rendered therein is conclusive, unless reversed or modified on appeal or writ of error; and no judgment can be questioned or impeached, collaterally, for any errors or irregularities which could have been corrected on appeal or writ of error: Patterson *v.* The State, 12 Green (Ia.) 492; State *v.* Helmer, 21 Ia. 370; Henderson *v.* Staniford, 105 Mass. 504.

ATTORNEY'S IGNORANCE, NEGLIGENCE AND FRAUD.—Although a court of equity in one state may grant relief against a judgment entered in another where it is sought to obtain a judgment in the former state upon the judgment in the latter, in all cases where relief would be granted in the state where the judgment was first rendered, still a judgment in another state cannot be impeached on the ground of the ignorance, negligence or bad faith of an attorney: Amory *v.* Amory, 3 Biss. 266; Crawford *v.* White, 17 Ia. 560; Sipes *v.* Whitney, 30 Ohio St. 69. Nor can a judgment be attacked in a collateral manner on the ground that it was procured by fraud, and the issues reopened and determined by the judgment and evidence on the original trial: Field *v.* Saunderson, 34 Mo. 542; Barnard *v.* Fowler, 119 Mass. 262; Johnson *v.* Dobbins, 35 Leg. Int. 242; Davis *v.* Headley, 22 N. J. Eq. 115; Rogers *v.* Gwinn, 21 Ia. 38; Bicknel *v.* Field, 8 Paige 440; Luckenbach *v.* Anderson, 47 Penn. 123. But where an attorney for the plaintiff assured the defendant that nothing further should be done in the suit until further notice, and the attorney subsequently proceeded and obtained judgment without notice to the defendant, this was held, under the peculiar circumstances of the case, to be such a fraud as to entitle the defendant to relief therefrom: Pearce *v.* Olney, 20 Conn. 544; Ward *v.* Quinlivin, 57 Mo. 425; see also Clay *v.* Clay, 13 Tex. 195, where it was held that fraud in obtaining a judgment without the credit of a payment made during the pendency of the original suit might be shown in a suit on the judgment in another state, and that the payment might be there shown; see also Davis *v.* Smith, 5 Geo. 274; Buford *v.* Buford, 4 Munf. 241.

STATUTE OF LIMITATIONS.—The uni-

the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certif-

versal doctrine in reference to the laws of limitation applicable to judgments is that in a suit on a judgment the law of limitations of the state where the suit is brought is applicable, and not the statutes of the state where the judgment was originally rendered: McElmoyle *v.* Cohen, 13 Pet. 312; Bacon *v.* Howard, 20 How. 22; Bank *v.* Dalton, 9 How. 522; Robinson *v.* Payton, 4 Tex. 276; Pryor *v.* Moore, 8 Tex. 250; Kirkman *v.* Hendrick, 8 Tex. 253; Reid *v.* Boyd, 13 Tex. 241; Stockwell *v.* Coleman, 10 Ohio St. 33; Christmas *v.* Russell, 5 Wall. 290; Meek *v.* Meek, 45 Ia. 294.

JURISDICTION OF THE PERSON NECESSARY.—There must be some service of original process or an appearance, and a personal judgment rendered without either is void in another state: Warren Man. Co. *v.* Etna Ins. Co., 2 Paine 501; Westervelt *v.* Lewis, 2 McLean 511; De Arcy *v.* Ketchum, 11 How. 165; Jones *v.* Warner, 81 Ill. 343; Tait *v.* De Ende, 18 La. 33; McLaurens *v.* Monroe, 30 Mo. 462; Rangley *v.* Webster, 11 N. H. 299; Middlesex Bk. *v.* Butman, 29 Me. 19; Woodward *v.* Tremere, 23 Mass. 354; Bicknell *v.* Field, 8 Paige 440; Jardine *v.* Richert, 39 N. J. 165.

PRESUMPTIONS FROM RECITAL IN THE RECORD.—If a record shows service, this would be at least presumptive evidence that the service was made in accordance with the laws of the state where the judgment was rendered: Dunbar *v.* Hallowell, 34 Ill. 168; Trayden *v.* Justis, 24 La. An. 222; Wilson *v.* Jackson, 10 Mo. 329; Downer *v.* Shaw, 22 N. H. 277.

THE RECORD SHOWING SERVICE MAY BE CONTRADICTED.—Although an exemplified record of a court of another state may show that there was personal service of the original process, and this is *prima facie* evidence of the fact and of the jurisdiction of the court, yet the defendant may controvert this fact and by proof show that there was no such service: Knowles *v.* Gas Light Co., 19 Wall. 58; s. c., 2 Dill. 421; Pollard *v.* Baldwin, 22 Ia. 328; Lowe *v.* Lowe, 40 Ia. 220; Webster *v.* Hunter, 50 Ia. 215; Kingsbury *v.* Yniestra, 59 Ala. 320; Cheen *v.* Gray, 51 Tex. 112; Marx *v.* Fore, 51 Mo. 69; McDermott *v.* Clary, 107 Mass. 501; Norwood *v.* Cobb, 15 Tex. 500; Carleton *v.* Bickford, 79 Mass. 591; Lincoln *v.* Tower, 2 McLean 473.

So evidence may be introduced to prove that a vessel was not seized within the county where the judgment was rendered, although the certified record states that the seizure was within the county: Thompson *v.* Whitman, 18 Wall. 457. But the presumption arising from a recital in the record that service was made within the district cannot be overcome by mere proof that the defendant was not a resident of the state: Kuhn *v.* McMillen, 3 Dill. 372.

A RECITAL OF AN APPEARANCE MAY BE CONTROVERTED.—If a record shows an appearance by the defendant it is at least *prima facie* evidence of the fact: Whittaker *v.* Murray, 15 Ill. 293; Reber *v.* Wright, 68 Penn. 471; Cone *v.* Hooper, 18 Min. 531; Tipton *v.* Mayfield, 10 La. 189; Edmonds *v.* Montgomery, 1 Ia. 143; Cassidy *v.* Leetch, 53 How. Pr. 105; Price *v.* Ward, 25 N. J. 225; Kerr *v.* Kerr, 41 N. Y. 272; Eager *v.* Stover, 59 Mo. 87; Wilcox *v.* Cassock, 2 Mich. 165.

SERVICE OF ORIGINAL PROCESS OUT OF THE STATE.—The jurisdiction of state courts is limited by the boundary to the state, and original process issuing therefrom can have no force or effect without the state. Such process served without the state cannot give the state court jurisdiction of the person of a defendant, and a judgment *in personam* in such a case is void: Warren Man. Co. *v.* Etna Ins. Co., 2 Paine 501; Public Works *v.* Columbia College, 17 Wall. 521; Ewer *v.* Coffin, 55 Mass. 23; Price *v.* Hickok, 39 Vt. 292.

SERVICE BY PUBLICATION; AND BY COPY.—Within the limits, however, of natural justice and fundamental principles of right, a state may prescribe

icate of the presiding justice of the court of the county, parish or district in which such office may be kept, or of the governor or

the mode of bringing its own citizens before its courts, and the judgments of her courts entered on proceeding which conform to the statutes in such case provided cannot be impeached in the courts of another state. Thus, if the statute of a state permits a publication of notice against defendants residing out of a state, and some reside in and some without the state, and those in the state are personally served with original process and those without the state by publication, a judgment would be void in this respect against those defendants in the state who were personally served, but not as a personal judgment against the others: Stockwell *v.* McCracken, 109 Mass. 84; Knowles *v.* Gas and Coke Co., 19 Wall. 58; Welch *v.* Sykes, 8 Ill. 197; Gilman *v.* Lewis, 24 N. J. 246; De Arcy *v.* Ketchum, 11 How. 165; Hall *v.* Laming, 91 U. S. 160; Green *v.* Sarmiento, 3 Wash. 17; Christmas *v.* Russell, 5 Wall. 290; Bissill *v.* Briggs, 9 Mass. 462; Folger *v.* Ins. Co., 99 Mass. 267; Maxwell *v.* Stewart, 22 Wall. 77; Woodward *v.* Tremere, 23 Mass. 354; Reber *v.* Wright, 68 Pa. 471.

Although a corporation is considered a citizen of the state where it was incorporated, the statute of a state may provide for the service of original process on it, by service on an agent or officer of the corporation within the state where the suit is brought, and a judgment recovered on such a service would in that respect be binding in other states: Lafayette Ins. Co. *v.* French, 18 How. 404; s. c., 5 McLean 461; Waymouth *v.* Railroad Co., 1 McArthur 19; Moulin *v.* Ins. Co., 25 N. J. 57; Latimer *v.* Union Pac. R. Co., 43 Mo. 105.

Effect of a voluntary appearance.—A voluntary general appearance in a suit is a waiver of all defects in the form or service of original process, and a judgment therein will be valid in any other state; and all defects of this kind would be waived by pleading the judgment in bar to an action upon the original contract or other foundation of the suit: Henderson *v.* Steinford, 105 Mass. 504; Lucas *v.* Bank, 2 Stew. 280; Shields *v.* Thomas, 18 Ho. 253; Hill *v.* Mendenhall, 21 Wall. 453; Church *v.* Crossman, 49 Ia. 444; Kimbal *v.* Merrick, 20 Ark. 12; Smith *v.* Ross, 7 Mo. 463; Milne *v.* Van Buskirk, 9 Ia. 558; Wright *v.* Wersinger, 13 Miss. 210; Huston *v.* Dunn, 13 Tex. 476. See also Nations *v.* Johnson, 24 How. 195; Horton *v.* Critchfield, 18 Ill. 133.

In case of foreign attachment.—If the defendant in a foreign attachment suit is not served with original process and makes no voluntary appearance, the judgment is not conclusive evidence of the debt: Ricketts *v.* Henderson, 2 Cr. C. C. 157; Phelps *v.* Holker, 1 Dall. 261; Ewer *v.* Coffin, 55 Mass. 23; Gilman *v.* Gilman, 126 Mass. 26; Jones *v.* Spencer, 15 Wis. 583; Pelton *v.* Platner, 13 Ohio 209; Arndt *v.* Arndt, 15 Ohio 33; McVicker *v.* Beedy, 31 Me. 314; Price *v.* Hekok, 39 Vt. 292; Robins *v.* Ward, 8 Johns. 86; but if the defendant voluntarily appears in the action generally to defend, the judgment will be binding on him: Maxwell *v.* Stewart, 22 Wall. 77; Mayhew *v.* Thatcher, 6 Wh. 129; if the appearance is merely for the purpose of defending the property, it has been held that this did not give the court jurisdiction of the person: Starbuck *v.* Murray, 5 Wend. 148. See also Feltus *v.* Starke, 12 La. An. 798. And if the attachment was valid in the state where the suit was instituted, a sale of property under a judgment obtained therein will pass a valid title to the property: Green *v.* Van Buskirk, 7 Wall. 139; s. c., 2 Keyes 119; s. c., 34 Barb. 457; Melhop *v.* Doane, 31 Ia. 397.

Remedies on judgments in another state.—The remedy on a judgment rendered in another state is by a suit on the judgment, and a resort to such remedies as the state where the last judgment is obtained may afford. The form of the action will of course depend upon the laws of the latter state. No court can give effect to a judg-

secretary of state, the chancellor or keeper of the great seal, of the state or territory or country, that the said attestation is in due

ment of a court of another state in any other way; nor can it enforce the collateral remedies prevailing in the state where the original judgment was rendered: Dimick *v.* Brooks, 21 Vt. 569; Thorn *v.* Batory, 41 Md. 593; Briggs *v.* Campbell, 19 La. 524.

Interest and satisfaction.—The rate of interest on a judgment is governed by the law of the state where it was rendered, and not upon the law of another state where it is the basis of a new suit: Clark *v.* Pratt, 20 Ala. 470; Lewis *v.* Wilder, 4 La. An. 574; David *v.* Porter, 52 Ia. 254; Hudson *v.* Daily, 13 Ala. 722; but a new judgment in another state does not satisfy the original one: Bates *v.* Lyon, 7 Paige 85; nor is it a bar to another action on the original one unless it has been satisfied: Weeks *v.* Pearson, 5 N. H. 324; Tarver *v.* Rankin, 3 Fla. 210.

Decrees for divorce.—In case of a decree of divorce, if the court had jurisdiction over the parties under the laws of the state where it was made, it will be deemed valid in other states so far as the divorce is concerned; but in respect to collateral matters, such as alimony and property, it is not always conclusive of the rights of parties in another state: Cheever *v.* Wilson, 9 Wall. 108; Kinnier *v.* Kinnier, 45 N. Y. 535; Harrison *v.* Harrison, 20 Ala. 629; Barber *v.* Root, 10 Mass. 260; Kerr *v.* Kerr, 41 N. Y. 272; Smith *v.* Smith, 79 Mass. 209; Nicholas *v.* Nicholas, 25 N. J. Eq. 60; Doughty *v.* Doughty, 27 N. J. Eq. 315; s. c., 28 N. J. Eq. 581; Platt's Appeal, 80 Penn. St. 501; People *v.* Baker, 76 N. Y. 78; Cox *v.* Cox, 19 Ohio St. 505; s. c., 20 Ohio St. 439; Luth *v.* Luth, 39 N. H. 20; Hoffman *v.* Hoffman, 46 N. Y. 30; Hood *v.* Hood, 93 Mass. 196; Ditson *v.* Ditson, 4 R. I. 87; Hunt *v.* Hunt, 72 N. Y. 217; Lyon *v.* Lyon, 68 Mass. 367; Burlen *v.* Shannon, 115 Mass. 438; State *v.* Armington, 25 Min. 29; People *v.* Dawell, 25 Mich. 247; People *v.* Smith, 20 N. Y. 414; Middleworth *v.* McDowell, 49 Ind. 386.

Pleadings in a suit on a judgment.—The form of the action and the requirements of the declaration or petition must, as we have observed, conform to the practice of the state where the suit is brought. If the judgment or decree is conclusive between the parties in the state where it is rendered, it is, as we have seen, conclusive in other states if the court had jurisdiction. A plea therefore of *nil debet* is not a good plea to a declaration on a valid judgment of another state; the only plea which can be entered is *nul tiel* record: Maxwell *v.* Stewart, 22 Wall. 77; Mills *v.* Duryee, 7 Cr. 481; Hampton *v.* McConnel, 3 Wh. 234; Armstrong *v.* Carson, 2 Dall. 302; Jacquette *v.* Hugunon, 2 McLean 129; Lawrence *v.* Jarvis, 32 Ill. 304; Buchanan *v.* Port, 5 Ind. 264; Hensley *v.* Force, 12 Ark. 756. And the same rule applies to a judgment rendered by a court in the District of Columbia: Hughes *v.* Davis, 8 Md. 271; Duval *v.* Fearson, 18 Md. 502.

But if the invalidity of the judgment appears upon the record, or if the defendant desires to take issue on the jurisdiction of the court to render the judgment, then the plea *nil debet* or some equivalent plea under the statutes of the state is proper, as it presents the question of jurisdiction for inquiry; and the defendant may show that the court in which the judgment was rendered had no jurisdiction of the subject-matter of the suit or of the person of the defendant. Warren Mfg. Co. *v.* Etna Ins. Co., 2 Paine 501; Warren *v.* Flagg, 19 Mass. 448; Beale *v.* Berryman, 30 N. J. 216; Foster *v.* Glazner, 27 Ala. 391; Lawrence *v.* Jarvis, 32 Ill. 304; Starbach *v.* Murray, 5 Wend. 148; Price *v.* Ward, 25 N. J. 225; Shufeld *v.* Buckley, 45 Ill. 223; Warren *v.* McCarthy, 25 Ill. 95.

Such a plea must necessarily admit that the record exists as a matter of fact, and seek relief by avoiding its effect; and should therefore be formally pleaded in order that the facts

form, and by the proper officers. If the said certificate is given by the presiding justice of the court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor or keeper of the great seal, it shall be under the great seal of the state, territory or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state, territory or country, as aforesaid, from which they are taken.[1]

upon which it is predicated may be admitted or put in issue: Hill *v.* Mendenhall, 21 Wall. 453; Miller *v.* Pennington, 2 Stew. 399; Moulin *v.* Insurance Co., 24 N. J. 222; Lackland *v.* Pritchett, 12 Mo. 484. A plea of payment would always be good: Hutchinson *v.* Patrick, 3 Mo. 65; so of a plea that the plaintiff has executed to the defendant a release from the judgment; Eaton *v.* Hasty, 6 Neb. 419.

[1] WHAT RECORDS MAY BE CERTIFIED AS EVIDENCE.—The language "records and exemplification of books which may be kept in any public office of any state or territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court," means the public writings recognized by the common law as invested with an official character, but which are not of the nature of judicial records or judgments, and are therefore susceptible of proof by secondary evidence. Of this character are the acts and orders of the executive officer of the state; the acts of legislative bodies; the journals of either branch of the legislature; registers kept in public offices; books which contain the official proceedings of municipal corporations; parish registers and the like: Snyder *v.* Wise, 10 Penn. St. 157. Thus, an exemplified copy of a marriage license, certified and attested by the proper public officer: King *v.* Dale, 2 Ill. 513; or of the record of a patent to hold an office: Henthorn *v.* Shepherd, 1 Blackf. 157; or of a recorded guardian's bond, unless it is a matter of record in the probate court: Carlisle *v.* Tuttle, 30 Ala. 613, may be certified under this provision.

A deed or other instrument duly recorded under the laws of a state may be thus attested by the keeper of such record with the seal of his office annexed, if there is a further certificate of the presiding justice of the court of the county or district in which such office is kept that such attestation is in due form and by the proper officer, and this certificate is further authenticated by the clerk or prothonotary of the court under his hand and seal of office, that the justice who certifies is duly commissioned and qualified; and provided further that the effect of such a record as evidence be shown in the state where it is recorded: Drummond *v.* Magruder, 9 Ct. 122; Dickerson *v.* Grissom, 4 La. An. 538; Condit *v.* Blackwell, 19 N. J. Eq. 193; Powell *v.* Knox, 16 Ala. 364; Key *v.* Vaughn, 15 Ala. 497; Kidd *v.* Manly, 28 Miss. 156; Brown *v.* Edson, 23 Vt. 435; Pennel *v.* Weyant, 2 Har. 501; Paca *v.* Dutton, 4 Mo. 371; Smith *v.* Redden, 5 Har. 321; but a secretary of state need not certify that the attestation of articles of incorporation is in due form of law: Grant *v.* Henry Clay Coal Co., 80 Penn. 208.

COPIES OF FOREIGN RECORDS IN CERTAIN CASES.—*Sec.* 907. It shall be lawful for any keeper or person having the custody of laws, judgments, orders, decrees, journals, correspondence or other public documents of any foreign government or its agents, relating to the title to lands claimed by or under the United States, on the application of the head of one of the departments, the Solicitor of the Treasury, or the Commissioner of the General Land-Office, to authenticate copies thereof under his hand and seal, and to certify them to be correct and true copies of such laws, judgments, orders, decrees, journals, correspondence or other public documents, respectively; and when such copies are certified by an American minister or consul, under his hand and seal of office, to be true copies of the originals, they shall be sealed up by him and returned to the Solicitor of the Treasury, who shall file them in his office and cause them to be recorded in a book to be kept for that purpose. A copy of any such law, judgment, order, decree, journal, correspondence or other public document so filed, or of the same so recorded in said book, may be read in evidence in any court, where the title to land claimed by or under the United States may come into question, equally with the originals.

LITTLE & BROWN'S EDITION OF THE STATUTES TO BE EVIDENCE. —*Sec.* 908. The edition of the laws and treaties of the United States, published by Little & Brown, shall be competent evidence of the several public and private acts of Congress, and of the several treaties therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several states, without any further proof or authentication thereof.

The act of June 20, 1874, ch. 333, § 8, 18 Stat. 114, provides: That the said printed copies of the said acts of each session and of the said bound copies of the acts of each Congress shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States and of the several states therein.

The act of June 7, 1880, Res. 44, 21 Stat. 308, provides: The publication herein authorized shall be taken to be prima facie evidence of the laws therein contained in all the courts of the United States and of the several states and territories therein; but shall not preclude reference to, nor control in case of any discrep-

ancy the effect of, any original act as passed by Congress; *provided*, that nothing herein contained shall be construed to change or alter any existing law.

BURDEN OF PROOF ON THE DEFENDANT IN CERTAIN CASES.—*Sec.* 909. In suits or informations brought, where any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant; *provided*, that probable cause is shown for such prosecution, to be judged of by the court.[1]

POSSESSORY ACTIONS FOR THE RECOVERY OF MINING TITLES.—*Sec.* 910. No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possessions.

[1] If probable cause is shown for the prosecution under this section, the burden of proof is on the claimant: Locke *v.* United States, 7 Cr. 339. If a *prima facie* case is made out by the prosecutor and the claimant fails to produce papers or other evidence which must be in his possession or under his control, and which would determine the question, he cannot succeed: Clifton *v.* United States, 4 How. 242; The Luminary, 8 Wh. 407.

For an exposition of the term "probable cause," see The John Griffin, 15 Wall. 29; Woods *v.* United States, 16 Pet. 342. And whether probable cause has been shown is not a question of law for the court to determine: Clifton *v.* United States, *supra;* Taylor *v.* United States, 3 How. 197; Buckley *v.* United States, 4 How. 251; see also Cliquot's Champagne, 3 Wall. 114.

CHAPTER XXV.

PROVISIONS OF THE REVISED STATUTES REGULATING PROCEDURE IN THE FEDERAL COURTS.

§ 526. We have considered the subject of procedure in treating of the Supreme Court and the circuit and district courts; but for convenience for reference we insert the provisions of the statute relating to this subject:

SEALING AND TESTING OF WRITS.—*Sec.* 911. All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the Supreme Court or a circuit court shall bear teste of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence; and those issuing from a district court shall bear teste of the judge, or, when that office is vacant, of the clerk thereof. The seals of the said courts shall be provided at the expense of the United States.

TESTE OF PROCESS, DAY OF.—*Sec.* 912. All process issued from the courts of the United States shall bear teste from the day of such issue.

MESNE PROCESS, AND PROCEEDINGS IN EQUITY AND ADMIRALTY. —*Sec.* 913. The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States.

OTHER THAN EQUITY AND ADMIRALTY CAUSES.—*Sec.* 914. The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice,

pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.

ATTACHMENTS.—*Sec.* 915. In common law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process; *provided*, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy.

EXECUTIONS IN COMMON LAW CAUSES.—*Sec.* 916. The party recovering a judgment in any common law cause in any circuit or district court shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise.

POWER OF THE SUPREME COURT TO REGULATE THE PRACTICE OF CIRCUIT AND DISTRICT COURTS.—*Sec.* 917. The Supreme Court shall have power to prescribe from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the circuit and district courts.

PRACTICE IN THE SEVERAL COURTS TO BE REGULATED BY THEIR OWN RULES.—*Sec.* 918. The several circuit and district courts may from time to time, and in any manner not inconsistent with any law

of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.

SUITS FOR DUTIES, IMPOSTS, TAXES, PENALTIES OR FORFEITURES.—*Sec.* 919. All suits for the recovery of any duties, imposts or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes, and all suits arising under the postal laws, shall be brought in the name of the United States.

CONSOLIDATION OF REVENUE SEIZURES.—*Sec.* 920. Whenever two or more things belonging to the same person are seized for an alleged violation of the revenue laws, the whole must be included in one suit; and if separate actions are prosecuted in such cases, the court shall consolidate them.

ORDERS TO SAVE COSTS.—*Sec.* 921. When causes of a like nature or relative to the same question are pending before a court of the United States, or of any territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so.

WHEN THE MARSHAL OR HIS DEPUTY IS A PARTY IN A CAUSE.—*Sec.* 922. When the marshal or his deputy is a party in any cause, the writs and precepts therein shall be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them.

SEIZURES FOR FORFEITURE IN CERTAIN CASES.—*Sec.* 923. When any vessel, goods, wares or merchandise are seized by any officer of the customs, and prosecuted for forfeiture by virtue of any law respecting the revenue, or the registering and recording, or the enrolling and licensing of vessels, the court shall cause fourteen days' notice to be given of such seizure and libel, by causing the substance of such libel, with the order of the court thereon, setting forth the time and place appointed for trial, to be inserted in some

newspaper published near the place of seizure, and by posting up the same in the most public manner for the space of fourteen days, at or near the place of trial; and proclamation shall be made in such manner as the court shall direct. And if no person appears and claims such vessel, goods, wares or merchandise, and gives bond to defend the prosecution thereof, and to respond the cost in case he shall not support his claim, the court shall proceed to hear and determine the cause according to law.

ATTACHMENT IN POSTAL SUITS.—*Sec.* 924. In all cases where debts are due from defaulting or delinquent postmasters, contractors or other officers, agents or employés of the Post-Office Department, a warrant of attachment may issue against all real and personal property and legal and equitable rights belonging to such officer, agent or employé and his sureties, or either of them, in the following cases:

First.—When such officer, agent or employé and his sureties, or either of them, is a non-resident of the district where such officer, agent or employé was appointed, or has departed from such district for the purpose of permanently residing out of the same, or of defrauding the United States, or of avoiding the service of civil process.

Second.—When such officer, agent or employé and his sureties, or either of them, has conveyed away or is about to convey away his property, or any part thereof, or has removed or is about to remove the same, or any part thereof, from the district wherein it is situate, with intent to defraud the United States.

And when any such property has been removed, certified copies of the warrant may be sent to the marshal of the district into which the same has been removed, under which certified copies he may seize said property and convey it to some convenient point within the jurisdiction of the court from which the warrant originally issued. And alias warrants may be issued in such cases upon due application, and the validity of the warrant first issued shall continue until the return day thereof.

APPLICATION FOR WARRANT.—*Sec.* 925. Application for such warrant of attachment may be made by any district or assistant district attorney, or any other person authorized by the Postmaster General, before the judge, or, in his absence, before the clerk of any court of the United States having original jurisdiction of the cause

of action. And such application shall be made upon an affidavit of the applicant, or of some other credible person, stating the existence of either of the grounds of attachment enumerated in the preceding section, and upon production of legal evidence of the debt.

ISSUING WARRANT; DUTY OF CLERK AND MARSHAL.—*Sec.* 926. Upon any such application and upon due order of any judge of the court, or, in his absence, without such order, the clerk shall issue a warrant for the attachment of all the property of any kind belonging to the person specified in the affidavit, which warrant shall be executed with all possible dispatch by the marshal, who shall take the property attached, if personal, into his custody, and hold the same subject to all interlocutory or final orders of the court.

OWNERSHIP OF ATTACHED PROPERTY; TRIAL; OTHER REMEDIES.—*Sec.* 927. At any time within twenty days before the return day of such warrant the party whose property is attached may, on giving notice to the district attorney of his intention, file a plea in abatement, traversing the allegations of the affidavit, or denying the ownership of the property attached to be in the defendants or either of them; in which case the court may, upon application of either party, order an immediate trial by jury of the issues raised by the affidavit and plea; but the parties may, by consent, waive a trial by jury, in which case the court shall decide the issues raised. And any party claiming ownership of the property attached and a specific return thereof shall be confined to the remedy herein afforded, but his right to an action of trespass, or other action for damages, shall not be impaired hereby.

PROCEEDS OF ATTACHED PROPERTY TO BE INVESTED.—*Sec.* 928. When the property attached is sold on any interlocutory order of the court, or is producing any revenue, the money arising from such sale or revenue shall be invested in securities of the United States, under the order of the court, and all accretions shall be held subject to the orders of the same.

PUBLICATION OF ATTACHMENT.—*Sec.* 929. Immediately upon the execution of any such warrant of attachment, the marshal shall cause due publication thereof to be made, in the case of absconding debtors for two months and of non-residents for four months. The publication shall be made in some newspaper published in the district where the property is situate, and the details thereof shall be regulated by the order under which the warrant is issued.

PERSONS HAVING PROPERTY OF DEFENDANTS TO ACCOUNT FOR IT; SALES VOID; PERSONAL NOTICE.—*Sec.* 930. After the first publication of such notice of attachment as required by law, every person indebted to or having possession of any property belonging to the said defendants, or either of them, and having knowledge of such notice, shall account and answer for the amount of such debt and the value of such property; and any disposal or attempt to dispose of any such property, to the injury of the United States, shall be illegal and void. And when the person indebted to or having possession of the property of such defendants, or either of them, is known to the district attorney or marshal, such officer shall see that personal notice of the attachment is served upon such person, but the want of such notice shall not invalidate the attachment.

DISCHARGE OF ATTACHMENT; BOND.—*Sec.* 931. Upon application of the party whose property has been attached, the court, or any judge thereof, may discharge the warrant of attachment as to the property of the applicant, provided such applicant shall execute to the United States a good and sufficient penal bond, in double the value of the property attached, to be approved by a judge of the court, and with condition for the return of said property, or to answer any judgment which may be rendered by the court in the premises.

ACCRUED RIGHTS NOT TO BE ABRIDGED.—*Sec.* 932. Nothing contained in the preceding eight sections shall be construed to limit or abridge, in any manner, such rights of the United States as have accrued or been allowed in any district under the former practice of or the adoption of state laws by the United States courts.

ATTACHMENTS DISSOLVED IN CONFORMITY WITH STATE LAWS.—*Sec.* 933. An attachment of property, upon process instituted in any court in the United States, to satisfy such judgment as may be recovered by the plaintiff therein, except in the cases mentioned in the preceding nine sections, shall be dissolved when any contingency occurs by which, according to the laws of the state where said court is held, such attachment would be dissolved upon like process instituted in the courts of said state; *provided*, that nothing herein contained shall interfere with any priority of the United States in the payment of debts.

PROPERTY TAKEN UNDER REVENUE LAWS IRREPLEVIABLE.—*Sec.* 934. All property taken or detained by any officer or other person,

under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

GARNISHEES IN SUITS BY THE UNITED STATES ON NOTES, ETC.—*Sec.* 935. In any suit by the United States against a corporation for the recovery of money upon a bill, note or other security, the debtors of the corporation may be summoned as garnishees; and it shall be the duty of any person so summoned to appear in open court and to depose, in writing, to the amount which he was indebted to the said corporation at the time of the service of the summons and at the time of making such deposition; and judgment may be entered in favor of the United States for the sum admitted by such garnishee to be due to the said corporation, in the same manner as if it had been due to the United States; *provided*, that no judgment shall be entered against any garnishee until after judgment has been rendered against the corporation defendant to the said action, or until the sum in which the garnishee stands indebted is actually due.

ISSUE TENDERED WHEN GARNISHEE DENIES INDEBTEDNESS.—*Sec.* 936. When any person summoned as garnishee deposes in open court that he is not, and was not at the time of the service of the summons, indebted to such corporation, an issue may be tendered by the United States upon such demand, and if, upon the trial of that issue, a verdict is rendered against the garnishee, judgment shall be entered in favor of the United States, pursuant to such verdict, with costs of suit.

GARNISHEE FAILING TO APPEAR.—*Sec.* 937. If any person summoned as garnishee, as aforesaid, fails to appear at the term of the court to which he is summoned, he shall be subject to attachment for contempt of the court.

BAILING OF PROPERTY SEIZED UNDER CUSTOMS LAWS.—*Sec.* 938. Upon the prayer of any claimant to the court, that any vessel, goods, wares or merchandise, seized and prosecuted under any law respecting the revenue from imports or tonnage, or the registering and recording or the enrolling and licensing of vessels, or any part thereof, should be delivered to him, the court shall appoint three proper persons to appraise such property, who shall be sworn in open court, or before a commissioner appointed by the district court

to administer oaths to appraisers, for the faithful discharge of their duty; and the appraisement shall be made at the expense of the party on whose prayer it is granted. If, on the return of the appraisement, the claimant, with one or more sureties, to be approved by the court, shall execute a bond to the United States for the payment of a sum equal to the sum at which the property prayed to be delivered is appraised, and produce a certificate from the collector of the district where the trial is had, and of the naval officer thereof, if any there be, that the duties on the goods, wares and merchandise, or tonnage-duty on the vessel so claimed, have been paid or secured in like manner as if the same had been legally entered, the court shall, by rule, order such vessel, goods, wares or merchandise to be delivered to such claimant; and the said bond shall be lodged with the proper officer of the court. If judgment passes in favor of the claimant, the court shall cause the said bond to be cancelled; but if judgment passes against the claimant as to the whole or any part of such vessel, goods, wares or merchandise, and the claimant does not within twenty days thereafter pay into the court, or to the proper officer thereof, the amount of the appraised value of such vessel, goods, wares or merchandise so condemned, with the costs, judgment shall be granted upon the bond, on motion in open court, without further delay. (See § 570.)

Sale after condemnation.—*Sec.* 939. All vessels, goods, wares or merchandise which shall be condemned by virtue of any law respecting the revenue from imports or tonnage, or the registering and recording or the enrolling and licensing of vessels, and for which bonds shall not have been given by the claimant, shall be sold by the marshal or other proper officer of the court in which condemnation shall be had, to the highest bidder, at public auction, by order of such court, and at such place as the court may appoint, giving at least fifteen days' notice (except in cases of perishable merchandise) in one or more of the public newspapers of the place where such sale shall be; or if no paper is published in such place, in one or more of the papers published in the nearest place thereto; for which advertising a sum not exceeding five dollars shall be paid. And the amount of such sales, deducting all proper charges, shall be paid within ten days after such sale by the person selling the same to the clerk or other proper officer of the court directing such sale, to be by him, after deducting the charges allowed by the court,

paid to the collector of the district in which such seizure or forfeiture has taken place, as hereinbefore directed.

In cases of seizure, bailing of property in vacation.—*Sec.* 940. In any cause of admiralty and maritime jurisdiction, or other case of seizure, depending in any court of the United States, any judge of the said court, in vacation, shall have the same authority to order any vessel or cargo or other property to be delivered to the claimants, upon bail or bond, or to be sold when necessary, as the said court has in term time, and to appoint appraisers and exercise every other incidental power necessary to the complete execution of the authority herein granted; and the recognizance of bail or bond, under such order, may be executed before the clerk upon the party's producing the certificate of the collector of the district, of the sufficiency of the security offered; and the same proceedings shall be had in case of said order of delivery or of sale as are had in like cases when ordered in term time; *provided*, that upon every such application, either for an order of delivery or of sale, the collector and the attorney of the district shall have reasonable notice in cases of the United States, and the party or counsel in all other cases.

Delivery bond in admiralty proceedings.—*Sec.* 941. When a warrant of arrest or other process in rem is issued in any cause of admiralty jurisdiction, except the cases of seizure for forfeiture under any law of the United States, the marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the claimant of the property a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the court where the cause is pending, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in such cause. Such bond or stipulation shall be returned to the court, and judgment thereon, against both the principal and sureties, may be recovered at the time of rendering the decree in the original cause.

Special bail required in suits for duties and penalties.—*Sec.* 942. In all suits or prosecutions for the recovery of duties or pecuniary penalties prescribed by the laws of the United States, commenced in any state where, by the laws thereof, imprisonment for debt shall not have been abolished, the person against whom process is issued shall be held to special bail, subject

to the rules which prevail in civil suits in which special bail is required.

When defendant giving bail in one district is committed in another.—*Sec.* 943. When a defendant who has procured bail to respond to the judgment in a suit in any court of the United States in any district is afterward arrested in any other district and is committed to a jail the use of which has been ceded to the United States for the custody of prisoners, the judge of the court wherein the suit in which the defendant has so procured bail is depending shall, at the request of the bail, order that such defendant be held in said jail, in the custody of the marshal of the district in which it is. The said marshal, upon the delivery of such order, duly authenticated, shall receive such person into his custody, and thereupon be chargeable for an escape, and shall forthwith make a certificate, under his hand and seal, of such commitment, and transmit the same to the court from which the order issued, and, if required, shall make and deliver to such bail or his attorney a duplicate thereof. Upon the return of said certificate, the court which made the said order, or any judge thereof, may direct that an exoneretur be entered upon the bail-piece, where special bail shall have been found, or otherwise discharge such bail.

Defendant held until judgment in the first suit.—*Sec.* 944. When a defendant is committed by virtue of the order provided in the preceding section, he shall, unless sooner discharged by law, be holden in jail until final judgment is rendered in the suit in which he procured bail as aforesaid, and sixty days thereafter if such judgment is rendered against him, in order that he may be charged in execution, which may in such cases be directed to and served by the marshal in whose custody he is.

Bail and affidavits may be taken by commissioners of circuit courts.—*Sec.* 945. Bail and affidavits, when required or allowed in any civil cause in any circuit or district court, may be taken by a commissioner of the circuit court for the district; and such acknowledgments of bail and affidavits shall have the same effect as if taken before any judge of such courts.

Calling of bail in Kentucky.—*Sec.* 946. When a bail-bond is given for the appearance of any person to answer in the district or circuit court for the district of Kentucky, the clerk of such court shall call the party at the time he is bound to appear. If the party

fails, the clerk shall enter such failure on his minutes, and on said entry judgment may afterward be made of record by the court; but if the party appears, the clerk shall take another bond, with sureties similar to the first, for further appearance at the next succeeding term of the court, and if the party fails to give such other bond and surety, he shall stand committed by order of the clerk until he complies.

WHEN CLERKS MAY TAKE BAIL DE BENE ESSE.—*Sec.* 947. Recognizances of special bail may be taken de bene esse by the clerks of the circuit and district courts, in the absence or in case of the disability of the judges, in any action depending in either of the said courts, where special bail is demandable.

AMENDMENT OF PROCESS.—*Sec.* 948. Any circuit or district court may at any time, in its discretion and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced and the amendment will not injure the party against whom such process issues.

PRIORITY OF CASES IN WHICH A STATE IS A PARTY.—*Sec.* 949. When a state is a party, or the execution of the revenue laws of a state is enjoined or stayed, in any suit in a court of the United States, such state or the party claiming under the revenue laws of a state, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient reason, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties.

NOTICE OF CASE FOR TRIAL.—*Sec.* 950. In all civil actions in the courts of the United States either party may notice the same for trial.

SUITS OF UNITED STATES AGAINST INDIVIDUALS, WHAT CREDITS ALLOWED.—*Sec.* 951. In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States or by some unavoidable accident.

IN SUITS UNDER POSTAL LAWS, WHAT CREDITS ALLOWED.—*Sec.* 952. No claim for a credit shall be allowed upon the trial of any

suit for delinquency against a postmaster, contractor or other officer, agent or employé of the Post-Office Department, unless the same has been presented to the Sixth Auditor and by him disallowed, in whole or in part, or unless it is proved to the satisfaction of the court that the defendant is, at the time of trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting to the said Auditor a claim for such credit by some unavoidable accident.

BILL OF EXCEPTIONS.—*Sec.* 953. A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto.

DEFECTS OF FORM; AMENDMENTS.—*Sec.* 954. No summons, writ, declaration, return, process, judgment or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.

DEATH OF PARTIES.—*Sec.* 955. When either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly; and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a scire facias from the office of the clerk of the court where the suit is depending, twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against

the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court.

WHEN ONE OF SEVERAL PLAINTIFFS OR DEFENDANTS DIES.—*Sec.* 956. If there are two or more plaintiffs or defendants in a suit where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the writ or action shall not be thereby abated; but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant.

DELINQUENTS FOR PUBLIC MONEY; JUDGMENT AT RETURN TERM, UNLESS, ETC.—*Sec.* 957. When suit is brought by the United States against any revenue officer or other person accountable for public money, who neglects or refuses to pay into the treasury the sum or balance reported to be due to the United States, upon the adjustment of his account it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States attorney being present), makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officers of the treasury and rejected; specifying in the affidavit each particular claim so rejected, and that he cannot then safely come to trial. If the court, when such oath is made, subscribed and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted. Such continuance may also be granted when the suit is brought upon a bond or other sealed instrument, and the defendant pleads non est factum, or makes a motion to the court, verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, contract or other paper specified in the affidavit. And no continuance shall be granted except as herein provided.

JUDGMENT IN SUITS UNDER POSTAL LAWS.—*Sec.* 958. In suits arising under the postal laws the court shall proceed to trial, and render judgment at the return term; but whenever service of process is not made at least twenty days before the return day of such term, the defendant is entitled to one continuance, if, on his statement, the court deems it expedient; and if he makes affidavit that

he has a claim against the Post-Office Department, which has been submitted to and disallowed by the Sixth Auditor, specifying such claim in his affidavit, and that he could not be prepared for trial at such term for want of evidence, the court, if satisfied thereof, may grant a continuance until the next term.

JUDGMENT IN SUITS ON DEBENTURES.—*Sec.* 959. In all suits for the recovery of money upon debentures issued by the collectors of customs, under any act for the collection of duties, it shall be the duty of the court to grant judgment at the return term, unless the defendant, in open court, exhibits some plea, on oath, by which the court is satisfied that a continuance is necessary to the attainment of justice; in which case, and not otherwise, a continuance until the next term may be granted.

SUITS ON BONDS FOR RECOVERY OF DUTIES.—*Sec.* 960. When suit is brought on any bond for the recovery of duties due to the United States, it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States attorney being present), makes oath that an error has been committed in the liquidation of the duties demanded upon such bond, specifying the errors alleged to have been committed, and that the same have been notified in writing to the collector of the district before the said return term; whereupon a continuance may be granted until the next term, and no longer, if the court is satisfied that such continuance is necessary for the attainment of justice.

JUDGMENT FOR SUM DUE IN EQUITY ON BONDS, ETC.—*Sec.* 961. In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond or other specialty, where the forfeiture, breach or non-performance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury.

JUDGMENT FOR DUTIES, ETC.—*Sec.* 962. In all suits by the United States for the recovery of duties upon imports, or of penalties for the non-payment thereof, the judgment shall recite that it is rendered for duties, and such judgment, with interest thereon, and costs, shall be payable in the coin by law receivable for duties; and the execution issued thereon shall set forth that the recovery is for

duties, and shall require the marshal to satisfy the same in the coin by law receivable for duties; and in case of levy upon and sale of the property of the judgment debtor, the marshal shall refuse payment from any purchaser at such sale in any other money than that specified in the execution. (See § 3014.)

INTEREST ON BONDS FOR DUTIES.—*Sec.* 963. Upon all bonds on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of six per centum a year, from the time when said bonds became due.

INTEREST ON BALANCES DUE POST-OFFICE DEPARTMENT.—*Sec.* 964. In all suits for balances due to the Post-Office Department, interest thereon shall be recovered from the time of the default, at the rate of six per centum a year.

INTEREST ON DEBENTURES.—*Sec.* 965. In suits upon debentures, issued by the collectors of the customs under any act for the collection of duties, interest shall be allowed, at the rate of six per centum per annum, from the time when such debenture became due and payable.

INTEREST ON JUDGMENTS.—*Sec.* 966. Interest shall be allowed on all judgments in civil causes, recovered in a circuit or district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the state in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such state; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such state.

WHEN JUDGMENTS OF UNITED STATES COURTS CEASE TO BE LIENS.—*Sec.* 967. Judgments and decrees rendered in a circuit or district court, within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such state cease, by law, to be liens thereon.

NO COSTS ON RECOVERY OF LESS THAN $500.—*Sec.* 968. When, in a circuit court, a plaintiff in an action at law originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the amount in dispute, exclusive of costs, exceeds said sum or value; or a libellant, upon his own appeal, recovers less than the sum or value of

three hundred dollars, exclusive of costs, he shall not be allowed, but, at the discretion of the court, may be adjudged to pay, costs.

COSTS IN INTERNAL REVENUE SUITS UPON INFORMATION.—*Sec.* 969. When a suit for recovery of any penalty or forfeiture accruing under any law providing internal revenue is brought upon information received from any person other than a collector, deputy collector or inspector of internal revenue, the United States shall not be subject to any costs of suit.

CLAIMANT NOT ENTITLED TO COSTS WHEN REASONABLE CAUSE OF SEIZURE.—*Sec.* 970. When, in any prosecution commenced on account of the seizure of any vessel, goods, wares or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution; *provided*, that the vessel, goods, wares or merchandise be, after judgment, forthwith returned to such claimant or his agent.

DOUBLE COSTS, WHEN PLAINTIFF IS NONSUITED IN ACTION AGAINST OFFICER MAKING SEIZURE, ETC.—*Sec.* 971. If, in any suit against an officer or other person executing or aiding or assisting in the seizure of goods, under any act providing for or regulating the collection of duties on imports or tonnage, the plaintiff is nonsuited, or judgment passed against him, the defendant shall recover double costs.

IN COPYRIGHT SUITS, COSTS.—*Sec.* 972. In all recoveries under the copyright laws, either for damages, forfeitures or penalties, full costs shall be allowed thereon.

COSTS, INFRINGEMENT OF PATENT.—*Sec.* 973. When judgment or decree is rendered for the plaintiff or complainant, in any suit at law or in equity, for the infringement of a part of a patent, in which it appears that the patentee, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor, no costs shall be recovered unless the proper disclaimer, as provided by the patent-laws, has been entered at the Patent-Office before the suit was brought.

WHEN COSTS OF PROSECUTION TO BE PAID BY DEFENDANT.—*Sec.* 974. When judgment is rendered against the defendant in a prosecution for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs; and on every conviction for any other offence not capital, the court may, in its discretion, award that the defendant shall pay the costs of the prosecution.

WHEN COSTS ARE RECOVERED BY DEFENDANT IN A PROSECUTION. —*Sec.* 975. If any informer or plaintiff on a penal statute, to whom the penalty or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution, or is nonsuited therein, or if upon trial judgment is rendered in favor of the defendant, the court shall award to the defendant his costs, unless such informer or plaintiff is an officer of the United States specially authorized to commence such prosecution, and the court, at the trial in open court, certifies upon the record that there was reasonable cause for commencing the same; in which case no costs shall be adjudged to the defendant.

FEES OF CLERK, MARSHAL, ETC.; BY WHOM PAYABLE.—*Sec.* 976. If any informer on a penal statute, to whom the penalty or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution, or is nonsuited therein, or if upon trial judgment is rendered in favor of the defendant, such informer shall be alone liable to the clerk, marshal and attorney for the fees of such prosecution, unless he is an officer of the United States whose duty it is to commence such prosecution, and the court certifies that there was reasonable cause for commencing the same; in which case the United States shall be responsible for such fees.

COSTS; NONJOINDER OF ACTION.—*Sec.* 977. If several actions or processes are instituted, in a court of the United States or one of the territories, against persons who might legally be joined in one action or process touching the matter in dispute, the party pursuing the same shall not recover, on all of the judgments therein which may be rendered in his favor, the costs of more than one action or process, unless special cause for said several actions or processes is satisfactorily shown on motion in open court.

COSTS IN LIBELS AGAINST VESSEL AND CARGO.—*Sec.* 978. When proceedings are had before a court of the United States or of the territories, on several libels against any vessel and cargo, which

might legally be joined in one libel, there shall not be allowed thereon more costs than on one libel, unless special cause for libelling the vessel and cargo separately is satisfactorily shown on motion in open court. And in proceedings on several libels or informations against any cargo, or parts of cargo, or merchandise seized as forfeited for the same cause, there shall not be allowed more costs than would be lawful on one libel or information, whatever may be the number of owners or consignees therein concerned. But allowance may be made on one libel or information for the costs incidental to several claims.

CLAIMANT'S COSTS TO BE PAID BEFORE POSSESSION, WHEN, ETC.—*Sec.* 979. When judgment is rendered in favor of the claimant of any vessel or other property seized on behalf of the United States, and libelled or informed against as forfeited under any law thereof, he shall be entitled to possession of the same when his own costs are paid.

DISTRICT ATTORNEY'S COSTS.—*Sec.* 980. When a district attorney prosecutes two or more indictments, suits or proceedings which should be joined, he shall be paid but one bill of costs for all of them.

TAXATION OF FEES OF WITNESS BEFORE A COMMISSIONER.—*Sec.* 981. In no case shall the fees of more than four witnesses be taxed against the United States, in the examination of any criminal case before a commissioner of a circuit court, unless their materiality and importance are first approved and certified to by the district attorney for the district in which the examination is had; and such taxation shall be subject to revision, as in other cases.

ATTORNEY LIABLE FOR COSTS VEXATIOUSLY INCREASED BY HIM.—*Sec.* 982. If any attorney, proctor or other person admitted to conduct causes in any court of the United States, or of any territory, appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required, by order of the court, to satisfy any excess of costs so increased.

BILL OF COSTS; HOW TAXED.—*Sec.* 983. The bill of fees of the clerk, marshal and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are

recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause.

BILL OF COSTS TO BE SWORN TO.—*Sec.* 984. Before any bill of costs shall be taxed by any judge or other officer, or allowed by any officer of the treasury, in favor of clerks, marshals, commissioners or district attorneys, the party claiming such bill shall prove by his own oath or that of some other person having a knowledge of the facts, to be attached to such bill and filed therewith, that the services charged therein have been actually and necessarily performed, as therein stated.

EXECUTIONS TO RUN IN ALL THE DISTRICTS OF THE STATE.—*Sec.* 985. All writs of execution upon judgments or decrees obtained in a circuit or district court, in any state which is divided into two or more districts, may run and be executed in any part of such state; but shall be issued from and made returnable to the court wherein the judgment was obtained.

EXECUTIONS IN FAVOR OF UNITED STATES TO RUN IN EVERY STATE.—*Sec.* 986. All writs of execution upon judgments obtained for the use of the United States, in any court thereof, in one state, may run and be executed in any other state or in any territory, but shall be issued from and made returnable to the court wherein the judgment was obtained.

EXECUTION STAYED ON CONDITIONS.—*Sec.* 987. When a circuit court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. If such petition is filed within said term of forty-two days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall of course be further stayed to the next session of said court. If a new trial be granted, the former judgment shall be thereby rendered void.

JUDGMENT-DEBTOR; CONTINUANCE.—*Sec.* 988. In any state where judgments are liens upon the property of the defendant, and

where, by the laws of such state, defendants are entitled, in the courts thereof, to a stay of execution for one term or more, defendants in actions in the courts of the United States held therein shall be entitled to a stay of execution for one term.

EXECUTION AGAINST OFFICERS OF REVENUE.—*Sec.* 989. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him or for the recovery of any money exacted by or paid to him, and by him paid into the treasury in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the treasury.

IMPRISONMENT FOR DEBT.—*Sec.* 990. No person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished. And all modifications, conditions and restrictions upon imprisonment for debt, provided by the laws of any state, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such state.

DISCHARGE FROM ARREST OR IMPRISONMENT.—*Sec.* 991. When any person is arrested or imprisoned in any state, on mesne process or execution issued from any court of the United States, in any civil action, he shall be entitled to discharge from such arrest or imprisonment in the same manner as if he were so arrested and imprisoned on like process from the courts of such state. The same oath may be taken, and the same notice thereof shall be required, as may be provided by the laws of such state, and the same course of proceedings shall be adopted as may be adopted in the courts thereof. But all such proceedings shall be had before any one of the commissioners of the circuit court for the district where the defendant is so held.

PRIVILEGES OF JAIL LIMITS.—*Sec.* 992. Persons imprisoned on process issuing from any court of the United States in civil actions, as well at the suit of the United States as at the suit of any per-

son, shall be entitled to the same privileges of the yards of the respective jails as persons confined in like cases on process from the courts of the respective states are entitled to, and under the like regulations and restrictions.

GOODS TAKEN ON A FIERI FACIAS, HOW APPRAISED.—*Sec.* 993. When it is required by the laws of any state that goods taken in execution on a writ of fieri facias shall be appraised before the sale thereof, the appraisers appointed under the authority of the state may appraise goods taken in execution on a fieri facias issued out of any court of the United States, in the same manner as if such writ had issued out of a court of such state. And the marshal in whose custody such goods may be shall summon the appraisers, in the same manner as the sheriff is, by the laws of such state, required to summon them; and if the appraisers, being duly summoned, fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisement. When such appraisers attend they shall be entitled to the like fees as in cases of appraisements under the laws of the state.

DEATH OF MARSHAL AFTER LEVY OR SALE.—*Sec.* 994. When a marshal dies or is removed from office, or the term of his commission expires, after he has taken in execution, under process from a court of the United States, any lands, tenements or hereditaments, and before sale or other final disposition thereof, the like process shall issue to the succeeding marshal, and the same proceeding shall be had as if such marshal had not died or been removed or the term of his commission had not expired. And when a marshal dies or is removed from office, or the term of his commission expires, after he has sold any lands, tenements or hereditaments, under process from a court of the United States, and before a deed for the same is executed by him to the purchaser, such court may, on application by the purchaser, or by the plaintiff at whose suit the sale was made, setting forth the case and the reason why the title was not perfected by said marshal, order the marshal for the time being to perfect the title and execute a deed to the purchaser, upon his paying the purchase-money and costs remaining unpaid.

MONEYS PAID INTO COURT.—*Sec.* 995. All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer or a designated

depositary of the United States, in the name and to the credit of such court; *provided*, that nothing herein shall be construed to prevent the delivery of any such money upon security according to agreement of parties, under the direction of the court.

MONEYS DEPOSITED, HOW WITHDRAWN.—*Sec.* 996. No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn.

CHAPTER XXVI.

PROVISIONS OF THE REVISED STATUTES ON LIMITATIONS.

§ 527. **The statutes of limitations.**—We insert here the provisions of the statutes on limitations, with notes, for convenience of reference, as follows:

CAPITAL OFFENCES.—*Sec.* 1043. No person shall be prosecuted, tried or punished for treason or other capital offence, willful murder excepted, unless the indictment is found within three years next after such treason or capital offence is done or committed.

OFFENCES NOT CAPITAL.—*Sec.* 1044 (as amended by act of April 13, 1876, ch. 56, 19 Stat. 32). No person shall be prosecuted, tried or punished for any offence, not capital, except as provided in section 1046, unless the indictment is found or the information is instituted within three years next after such offence shall have been committed.[1]

[1] It is not necessary to make a special plea of the statute of limitations, but the defence may be under a plea of not guilty: United States *v.* Brown, 2 Lowell 267; United States *v.* White, 5 Cr. C. C. 73; United States *v.* Cook, 17 Wall. 168. An indictment will not be quashed although it is apparent from the record that the offence was committed more than three years before the indictment was found, as the defence of the statute of limitations cannot be set up by a demurrer: United States *v.* Cook, 17 Wall. 168; United States *v.* Watkins, 3 Cr. C. C. 441; United States *v.* White, 5 Cr. C. C. 368.

The indictment may set forth the true time of the commission of the offence, and any facts which show the defendant cannot avail himself of the statute as a defence, even though the time was more than three years before the finding of the indictment. Even if the indictment does not show that the defendant fled from justice, it may be given in evidence under the general issue: Id.

The time runs from the commission of the offence to the finding of an indictment or the filing of an information on which the defendant is tried; thus where an indictment for an offence was found within three years, but a *nolle prosequi* was entered upon it, and after the lapse of more than three years another indictment was found for the same offence, it was held that the second indictment could not be considered as an amendment of the first, but must be considered as the commencement of a new prosecution which was barred by the statute: United States *v.* Ballard, 3 McLean 469. This provision has no application to offences arising under the revenue laws: United States *v.* Hirsch, 100 U. S. 33. Where a pensioner made a demand upon an agent for a pension more than three years before the commencement of the prosecution for withholding it, this section was held to be a bar to the prosecution: United States *v.* Irvine, 98 U. S. 450.

FLEEING FROM JUSTICE.—*Sec.* 1045. Nothing in the two preceding sections shall extend to any person fleeing from justice.[1]

CRIMES UNDER THE REVENUE LAWS.—*Sec.* 1046. No person shall be prosecuted, tried or punished for any crime arising under the revenue laws or the slave-trade laws of the United States, unless the indictment is found or the information is instituted within five years next after the committing of such crime.[2]

The act of June 22, 1874, ch. 391, § 22, 18 Stat. 190, provides: That no suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs revenue laws of the United States shall be instituted unless such suit or action shall be commenced within three years after the time when such penalty or forfeiture shall have accrued; *provided*, that the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation.

PENALTIES AND FORFEITURES.—*Sec.* 1047. No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued; *provided*, that the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property.[3]

[1] The term "fleeing from justice" means to leave one's home or residence or known place of abode with intent to avoid detection and punishment for some offence against the United States, and not merely to avoid process, or avoid the criminal justice of the state: United States *v.* O'Brian, 3 Dill. 381; United States *v.* White, 5 Cr. C. C. 116. A person may come within this provision who does not leave the state or district, as by secreting himself within it: Id.

[2] The term "revenue laws" embraces only such statutes as have for their direct and avowed purpose the creating and securing of revenue, and not laws whose indirect operation may conduce to the fiscal wealth of the country: United States *v.* Mayo, 1 Gallis 377; United States *v.* Norton, 91 U. S. 566; United States *v.* Hirsch, 100 U. S. 33.

This section embraces a crime created by a statute relating to internal revenue: United States *v.* Dustin, 15 I. R. R. 30; United States *v.* Wright, 11 I. R. R. 35; *In re* Adolph Landsberg, 11 I. R. R. 150; McGlinchy *v.* United States, 4 Cliff. 312; Perkins *v.* United States, 4 Cliff. 321. But it does not embrace crimes under the act to establish the postal money-order system: United States *v.* Norton, 91 U. S. 566.

[3] The word "penalty" in this section has been held to mean the same

PARTIES BEYOND THE REACH OF PROCESS DURING REBELLION.—*Sec.* 1048. In all cases where, during the late rebellion, any person could not, by reason of resistance to the execution of the laws of the United States, or of the interruption of the ordinary course of judical proceedings, be served with process for the commencement of any action, civil or criminal, which had accrued against him, the time during which such person was beyond the reach of legal process shall not be taken as any part of the time limited by law for the commencement of such action.[1]

as fine, that is, a fixed pecuniary mulct incurred by a violation of some law: *In re* Landsberg, 11 I. R. R. 150; and it applies to an action of debt to recover a penalty as well as to an information or indictment: Adams *v.* Woods, 2 Cr. 336; and to suits *in personam* and *in rem:* Hatch *v.* The Boston, 3 Fed. Rep. 807. See also Stimpson *v.* Pond, 2 Curt. 502; United States *v.* Brown, 2 Low. 267. But it does not apply to an action for the penalty of a bond: Raymond *v.* United States, 14 Blatch. 51.

The action of a master of a vessel to recover a penalty for refusal or neglect to deposit his papers with the consul is within the provisions of this section: Parsons *v.* Hunter, 2 Sum. 419; and for penalties and forfeitures arising under customs laws: *In re* Landsberg, 11 I. R. R. 150; but the statute will not bar a right of action secured to the United States by an act of Congress: Perkins *v.* United States, 4 Cliff. 312; McGlinchy *v.* United States, 4 Cliff. 321.

[1] This section is not a statute of limitation, for it does not specify any time within which the action must be commenced, nor does it apply to actions between persons who resided in the Confederate States: Graydon *v.* Sweet, 1 Woods 418; Lockhart *v.* Horn, 1 Woods 569. It requires all the time to be deducted from the ordinary limitation during which the suit could not be prosecuted by reason of resistance to the laws or interruption of judicial proceedings, whether before or after the passage of the act; and if the defendant was in some place within the Confederate States where the judicial tribunals were not interrupted, but were open for the prosecution of suits, and process could have been served upon the defendant, the general rule of limitation would apply: United States *v.* Wiley, 11 Wall. 508; Britton *v.* Butler, 11 Blatch. 350.

RULES

OF THE

SUPREME COURT OF THE UNITED STATES.

Rule 1.—Clerk.

1. Office.—The clerk of this court shall reside and keep the office at the seat of the national government, and he shall not practice either as an attorney or counsellor in this court or any other court while he shall continue to be clerk of this court.

2. Duties.—The clerk shall not permit any original record or paper to be taken from the court-room, or from the office, without an order from the court.

Rule 2.—Attorneys.

1. Admission of.—It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the supreme courts of the states to which they respectively belong, and that their private and professional character shall appear to be fair.

2. Oath.—They shall respectively take and subscribe the following oath or affirmation, viz.:

I, , do solemnly swear (or affirm, as the case may be) that I will demean myself, as an attorney and counsellor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

Women may be admitted to practice.—The act of February 15, 1879, provides: That any woman who shall have been a member of the bar of the highest court of any state or territory, or of the supreme court of the District of Columbia, for the space of three years, and shall have maintained a good standing before such court, and who shall be a person of good moral character, shall, on motion, and the production of such record, be admitted to practice before the Supreme Court of the United States.

Rule 3.—Practice.

How regulated.—This court consider the practice of the courts of King's Bench and of Chancery, in England, as affording outlines for the practice of this court; and they will from time to time make such alterations therein as circumstances may render necessary.

Rule 4.—Bill of Exceptions.

What required of.—Hereafter the judges of the circuit and district courts shall not allow any bill of exceptions, which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and such matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court.

Rule 5.—Process.

1. In name of the President.—All process of this court shall be in the name of the President of the United States.

2. Service on state.—When process at common law, or in equity, shall issue against a state, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such state.

3. Subpœna, service of.—Process of subpœna issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpœna, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed ex parte.

Rule 6.—Motions.

1. To be in writing.—All motions hereafter made to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court granted before the argument begins. [Amended November 27, 1876.]

2. Notice of.—No motion to dismiss, except on special assignment by the court, shall be heard unless previous notice has been

given to the adverse party or the counsel or attorney of such party.

3. How to be submitted.—All motions to dismiss appeals and writs of error, except motions to docket and dismiss under the 9th rule, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for plaintiff in error or appellant of record in this court at least three weeks before the time fixed for submitting the motion, in all cases, except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days.

There may be united with a motion to dismiss a writ of error or appeal a motion to affirm, on the ground that, although the record may show that this court has jurisdiction, it is manifest the appeal or writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

4. Service by mail, proof of.—Affidavit of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail the three weeks or thirty days before the time fixed by the notice, will be regarded as prima facie evidence of service on counsel who reside without the District of Columbia. On proof of such service the motion will be considered, unless for satisfactory reasons further time be given by the court to either party.

5. Motion day.—The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion day shall be Monday of each week, in lieu of Friday, and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a cause upon the docket.

Rule 7.—Law Library.

1. Use of books.—During the session of the court any gentleman of the bar having a cause on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon ap-

plication to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. And it shall be the duty of the clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof; as also one dollar per day for each day's detention beyond the limited time.

2. Conference-room.—The clerk shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference-room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one except the judges of the court.

3. Record deposited.—The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs or arguments filed therein.

Rule 8.—Writ of Error and Return Day.

1. Return, how made.—The clerk of the court to which any writ of error shall be directed may make return of the same by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the court.

2. Opinions annexed to record.—In all cases brought to this court by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. What to be filed.—No cause will hereafter be heard until a complete record, containing in itself, without references aliunde, all the papers, exhibits, depositions and other proceedings which are necessary to the hearing in this court, shall be filed.

4. Original papers.—Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in this court, upon appeal or writ

of error, such presiding judge may make such rule or order for the safe keeping, transporting and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. RETURN DAY OF WRIT.—In cases where final judgment is rendered more than thirty days before the first day of the next term of this court, the writ of error and citation, if taken before, must be returnable on the first day of said term and be served before that day; but in cases where the judgment is rendered less than thirty days before the first day, the writ of error and citation may be made returnable on the third Monday of the said term and be served before that day.

RULE 9.—DOCKETING CASES.

1. DUTIES OF APPELLANT.—In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause and file the record thereof with the clerk of this court within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause and file the record thereof with the clerk of this court within the first thirty days of the term; and if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal has been duly sued out and allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. RIGHT OF APPELLEE.—But the defendant in error or appellee may, at his option, docket the cause and file a copy of the record with the clerk of the court; and if the case is docketed, and a copy of the record filed with the clerk of this court by the plaintiff in

error or appellant, within the periods of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter during the term, the case shall stand for argument at the term.

3. Appearance of counsel.—Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the plaintiff in error or appellant shall be entered.

4. Time extended.—In all cases where the period of thirty days is mentioned in this rule it shall be extended to sixty days in writs of error and appeals from California, Oregon, Washington, New Mexico, Utah, Nevada, Arizona, Montana and Idaho.

Rule 10.—Security for Costs.

1. Bond for costs.—In all cases the plaintiff in error or appellant, on docketing a cause and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction for the payment of his fees, or otherwise satisfy him in that behalf.

Printing Records.

2. Costs of printing.—In all cases the clerk shall have twenty copies of the record printed for the court, and the cost of printing shall be charged to the government in the expenses of the court. (Amended Nov. 1, 1875.)

3. Duty of clerk.—The clerk shall furnish copies for the printer, shall supervise the printing and shall take care of and distribute the printed copies to the judges, the reporter and the parties, from time to time, as required.

4. Costs for manuscript.—In each case fees shall be charged in the taxable costs for but one manuscript copy of the record, and that shall be to the party bringing the cause into court, unless the court shall otherwise direct. (Amended Nov. 27, 1876.)

5. Who entitled to copy.—In all cases the clerk shall deliver a copy of the printed record to each party; and in cases of dismissal, reversal or affirmance with costs the fees for the said manuscript copy of the record shall be taxed against the party against whom costs are given, and which charge includes the charge for the copy furnished him.

6. Fee in case of dismissal.—In all cases of dismissal for want of jurisdiction the fees for the copy shall be taxed against the

party bringing the cause into court, unless the court shall otherwise direct. (Amended May 8, 1876.)

Attachment for Costs.

7. When to issue.—Upon the clerk of this court producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of the said fees.

Rule 11.—Translations.

How supplied.—Whenever any record, transmitted to this court upon a writ of error or appeal, shall contain any document, paper, testimony or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed, but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court in order that a translation may be there supplied and inserted in the record.

Rule 12.—Evidence.

1. Further proof.—In all cases where further proof is ordered by the court, the depositions which shall be taken shall be by a commission to be issued from this court or from any circuit court of the United States.

2. In admiralty cases.—In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice; *provided, however*, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where, by law, it is admissible.

Rule 13.—Deeds, etc., Objections to, Admissions.

Objections in equity and admiralty.—In all cases of equity and admiralty jurisdiction heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

Rule 14.—Certiorari.

Record, how obtained.—No certiorari for diminution of the record shall be hereafter awarded in any cause, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari shall be made at the first term of the entry of the cause; otherwise the same shall not be granted, unless upon special cause shown to the court accounting satisfactorily for the delay.

Rule 15.—Death of a Party.

1. Abatement and revivor.—Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the same reversed if it be erroneous; *provided, however*, that a copy of every such order shall be printed in some newspaper at the seat of government in which the laws of the United States shall be printed by authority, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. When action abates.—When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When appellee is dead.—When either party to a suit in the circuit courts of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States from any final judgment or decree rendered in said circuit courts, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead, and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some state or territory of the United States, the party desiring such writ of error or appeal may procure the same and may supersede or stay proceedings on such judgment or decree in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the court to which such writ of error or appeal is returnable, the plaintiff in error, or appellant, shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some state or territory of the United States, and stating therein the name and character of such representative, and the state or territory in which such representative resides; and upon such suggestion he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and on hearing have the judgment or decree reversed, if the same be erroneous; *provided, however*, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing; *and provided also*, that in every such case, if the representative of

the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate; *and provided also*, that the said representative may, at any time before or after said suggestion, come in and be made a party to the suit, and thereupon the cause shall proceed, and be heard and determined as in other cases.

Rule 16.—No Appearance for Plaintiff.

At trial.—Where there is no appearance for the plaintiff when the case is called for trial, the defendant may have the plaintiff called and dismiss the writ of error, or may open the record and pray for an affirmance.

Rule 17.—No Appearance for Defendant.

At trial.—Where the defendant fails to appear when the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause.

Rule 18.—Non-appearance of either Party.

At call of docket.—When a case is reached in the regular call of the docket, and no appearance is entered for either party, the case shall be dismissed at the costs of the plaintiff.

Rule 19.—Neither Party Ready.

At second term, dismissal.—When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the costs of the plaintiff, unless sufficient cause is shown for further postponement.

Rule 20.—Printed Arguments and Briefs.

1. Distribution of copies.—In all cases brought here on appeal, writ of error or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose so to submit the same within the first ninety days of the term; but twenty copies of the argu-

ments, signed by attorneys or counsellors of this court, must be first filed: ten of these copies for the court, two for the reporter, three to be retained by the clerk, and the residue for counsel.

2. EFFECT OF FILING ARGUMENT.—When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. WHEN ORAL ARGUMENT.—When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument will be received unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the ex parte argument.

4. NO BRIEF RECEIVED AFTER ARGUMENT.—No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

RULE 21.—COUNSEL LIMITED.

1. TWO COUNSEL.—Only two counsel shall be heard for each party on the argument of a cause.

2. TWO HOURS.—Two hours on each side shall be allowed to the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion; *provided always*, that a fair opening of the case shall be made by the party having the opening and closing arguments.

3. COUNSEL FOR PLAINTIFF.—The counsel for the plaintiff in error, or appellant, shall file with the clerk of the court, at least six days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

4. CONTENTS OF BRIEF.—This brief shall contain, *in the order here stated*—

(1) A concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2) An assignment of the errors relied upon, which in cases brought up by writ of error shall set out separately and specifically each error asserted and intended to be urged, and in cases brought

up by appeal, the assignment shall state, as specifically as may be, in what the decree is alleged to be erroneous. If error is assigned to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

5. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be instructions given or instructions refused.

6. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected.

7. Counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his argument, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff or appellant, except that no assignment of errors is required, and no statement of the case, unless that presented by the plaintiff or appellant is controverted.

8. Without such an assignment of errors, counsel will not be heard except at the request of the court, and errors not assigned according to this rule will be disregarded, though the court, at its option, may notice a plain error not assigned.

9. When, according to this rule, a plaintiff in error, or an appellant, is in default, the case may be dismissed on motion, and when a defendant in error, or an appellee, is in default, he will not be heard except on consent of his adversary, and with request of the court.

10. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

Rule 22.—Order of Argument.

Opening and close.—The plaintiff or appellant in this court shall be entitled to open and conclude the case. But when there

are cross-appeals, they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

Rule 23.—Interest.

1. On affirmance.—In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below, until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment is rendered.

2. Damage on frivolous appeal.—In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at the rate of ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. On appeal from decree.—The same rule shall be applied to decrees for the payment of money in cases of chancery, unless otherwise ordered by this court.

Rule 24.—Costs.

1. On dismissal.—In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, as the case may be, unless otherwise agreed by the parties.

2. On affirmance.—In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, as the case may be, unless otherwise ordered by the court.

3. On reversal.—In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, as the case may be, unless otherwise ordered by the court. The costs of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. Not applicable to United States.—Neither of the foregoing rules shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. MANDATE.—In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a procedendo, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

6. COSTS TO BE INSERTED.—When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

RULE 25.—OPINIONS OF THE COURT.

1. RECORDED.—All opinions delivered by the court shall immediately, upon the delivery thereof, be delivered over to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded and to deliver a copy to the reporter as soon as the same shall be recorded.

2. WHEN RECORDED.—The opinions of the court, as far as practicable, shall be recorded during the term, so that the publication of the reports may not be delayed thereby.

3. PRESERVATION OF.—The original opinions of the court shall be filed with the clerk of this court for preservation.

RULE 26.—CALL OF THE DOCKET.

1. ON SECOND DAY OF TERM.—The court on the second day in each term will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day, during the term, in the same order, except as hereinafter provided; and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the cause shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court.

2. TEN CAUSES ONLY EACH DAY.—Ten causes only shall be considered as liable to be called on each day during the term, including the one under argument.

3. CRIMINAL CASES ADVANCED.—Criminal cases may be advanced, by leave of the conrt, on motion of either party.

4. CASES OF GENERAL PUBLIC INTEREST.—Revenue cases and

cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also, by leave of the court, be advanced on motion of the Attorney-General.

All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

5. ORDER TO BE PRESERVED.—No other cause shall be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances, to be shown to the court. Every cause which shall have been called in its order and passed, and put at the foot of the docket, shall, if not again reached during the term it was called, be continued to the next term of the court.

6. WHAT CAUSES HEARD TOGETHER.—Two or more cases also involving the same question may, by leave of the court, be heard together, but they must be argued as one case.

7. REINSTATEMENT OF CAUSE.—If, after a cause has been passed, under circumstances which do not place it at the foot of the docket, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the cause shall then be by him reinstated for call, ten cases after that under argument or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the cause, and it shall then be assigned to such place upon the docket as the court may direct. No stipulation to pass a cause without placing it at the foot of the docket will be recognized as binding upon the court. A cause can only be so passed upon application made and leave granted in open court.

RULE 27.—ADJOURNMENT.

ANNOUNCEMENT OF.—The court will, at every session, announce on what day it will adjourn, at least ten days before the time which shall be fixed upon; and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

RULE 28.—DISMISSAL, IN VACATION.

ON AGREEMENT.—Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in any

appeal, shall at any time hereafter, in vacation and out of term time, by their respective attorneys, who are entered as such on the record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and also paying to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party which may request it a copy of the agreement filed; but no mandate or other process is to issue without an order by the court.

Rule 29.—Supersedeas.

Bond of indemnity.—Supersedeas bonds in the circuit courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including "just damages for delay" and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin and in suits on mortgages; or where the property is in the custody of the marshal, under admiralty process, as in case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property and the costs of the suit and "just damages for delay," and costs and interest on the appeal.

Rule 30.—Suspension or Modification of Injunction.

Application for.—In cases where appeals of the character mentioned in Rule 93, regulating equity practice, have already been taken, this court will, after the cause has been docketed, entertain an application for a suspension or modification of the injunction based upon a statement of the facts affecting the application by a justice or judge who took part in the decision. All such applications must be printed and submitted on briefs. No oral arguments will be heard unless specially ordered.

RULE 31.—FORM OF PRINTED RECORDS AND BRIEFS.

All records and arguments printed for the use of the court must be in such form and size that they can be conveniently cut and bound so as to make an ordinary octavo volume. The clerk will not receive or file records or arguments intended for distribution to the judges that do not conform to the requirements of this rule.

RULES OF PRACTICE

FOR THE

COURTS OF EQUITY OF THE UNITED STATES.

Rule 1.

Court always open.—The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits.

Rule 2.

Clerk's office; when open.—The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining and disposing of all motions, rules, orders and other proceedings, which are grantable of course, and applied for or had by the parties or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

Rule 3.

Orders, rules, etc.—Any judge of the circuit court, as well in vacation as in term, may, at chambers, or on the rule-days at the clerk's office, make and direct all such interlocutory orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing.

Rule 4.

Motions, rules and orders.—All motions, rules, orders and other proceedings made and directed at chambers, or on rule-days at the clerk's office, whether special or of course, shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office hours to the free inspection of the parties in any suit in equity and their solicitors. And except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices and other proceedings entered in such order-book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders or other proceedings not requiring personal service on the parties, in their discretion.

Rule 5.

Motions for process, etc., as of course.—All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers and other pleadings; for making amendments to bills and answers; for taking bills pro confesso; for filing exceptions, and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended or altered or rescinded by any judge of the court, upon special cause shown.

Rule 6.

Motions and orders not grantable of course.—All motions for rules or orders and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned

by a judge of the court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court ex parte, and granted, as if not objected to, or refused, in his discretion.

Rule 7.

Compulsory process.—The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

Rule 8.

Final process.—Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of non est inventus, to compel obedience to the decree. (See Rule 92.)

Rule 9.

Writ of assistance.—When any decree or order is for the delivery of possession upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

Rule 10.

Parties, how affected.—Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party in the cause.

Rule 11.

Subpœna.—No process of subpœna shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

Rule 12.

Subpœna, when returnable.—Whenever a bill is filed, the clerk shall issue the process of subpœna thereon as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule-day, or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpœna shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise, the bill may be taken pro confesso. Where there are more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpœna against all the defendants.

Rule 13.

Service.—The service of all subpœnas shall be by a delivery of a copy thereof, by the officer serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling-house or

usual place of abode of each defendant, with some adult person who is a member or resident in the family.

Rule 14.

Alias subpœna.—Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpœna, toties quoties, against such defendant, if he shall require it, until due service is made.

Rule 15.

Who to make service.—The service of all process, mesne and final, shall be by the marshal of the district or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case the person serving the process shall make affidavit thereof.

Rule 16.

Entry on docket on return.—Upon the return of the subpœna as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

Rule 17.

Day of appearance.—The appearance day of the defendant shall be the rule-day to which the subpœna is made returnable, provided he has been served with the process twenty days before that day; otherwise, his appearance day shall be the next rule-day succeeding the rule-day when the process is returnable.

Entry of.—The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk.

Rule 18.

Default for failure to plead.—It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer or answer to the bill, in the clerk's office, on the rule-day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken pro con-

fesso; and thereupon the cause shall be proceeded in ex parte, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill within a period to be fixed by the court or judge, and undertaking to speed the cause.

Rule 19.

Decree on default.—When the bill is taken pro confesso, the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill pro confesso, and such decree rendered shall be deemed absolute, unless the court shall at the same term set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct for the purpose of speeding the cause.

Rule 20.

Introductory part. — Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the circuit court of the United States for the district of ———: A. B., of ———, and a citizen of the state of ———, brings this his bill against C. D., of ———, and a citizen of the state of ———, and E. F., of ———, and a citizen of the state of ———. And thereupon your orator complains and says, that," etc.

Rule 21.

What to omit and what to state.—The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of ne exeat regno, or any other special order pending the suit, is required, it shall also be specially asked for.

Rule 22.

Parties out of jurisdiction of the court.—If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

Rule 23.

Prayer for process, what it must contain.—The prayer for process of subpœna in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an in-

junction, or a writ of ne exeat regno, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

Rule 24.

Signature of counsel.—Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

Rule 25.

Taxable costs limited.—In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the state court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

Rule 26.

Surplusage.—Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recital of deeds, documents, contracts or other instruments, in hæc verba, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may on exceptions be referred to a master by any judge of the court for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

Rule 27.

Exceptions.—No order shall be made by any judge for referring any bill, answer or pleading, or other matter or proceeding depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing

the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.

Rule 28.

When amendments are as of course.—The plaintiff shall be at liberty, as a matter of course and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

Rule 29.

Amendments by order of court.—After an answer or plea or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the pro-

posed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

Rule 30.

When order may be abandoned.—If the plaintiff so obtaining any order to amend his bill after answer or plea or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office, on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

Rule 31.

Certificate required.—No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay; and if a plea, that it is true in point of fact.

Rule 32.

May demur or plead with leave of court.—The defendant may, at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.

Rule 33.

Argument on plea.—The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

RULE 34.

WHEN COSTS ON DEMURRER OVERRULED.—If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant had good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him, pro confesso, and the matter thereof proceeded in and decreed accordingly.

RULE 35.

WHEN COSTS ON DEMURRER ALLOWED.—If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

RULE 36.

DEMURRER, SUFFICIENCY OF.—No demurrer or plea shall be held bad and overruled upon argument only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

RULE 37.

DEMURRER AND ANSWER TO SAME MATTER.—No demurrer or plea shall be held bad and overruled upon argument only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

RULE 38.

FAILURE TO REPLY OR SET DOWN PLEA OR DEMURRER FOR ARGUMENT.—If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule-day when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dis-

missed as of course, unless a judge of the court shall allow him further time for the purpose.

Rule 39.

Sufficiency of.—The rule that if a defendant submits to answer he shall answer fully to all the matters of the bill shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defence (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defence. Thus, for example, a bona fide purchaser for a valuable consideration, without notice, may set up that defence by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of title than he would be in any answer in support of such plea.

Rule 40.

What defendant is not bound to answer.—A defendant shall not be bound to answer any statement or charge in the bill unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

Ordered (December Term, 1850), that the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the circuit courts, be and the same is hereby repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so to obtain a discovery.

Rule 41.

Interrogatories to be numbered.—The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, etc.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

Amendment to Equity Rule 41.

When answer not evidence.—If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864. (See Revised Statutes, § 858.)

Rule 42.

What interrogatories part of bill.—The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

Rule 43.

Form preceding interrogating part.—Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end, therefore," there shall

hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are respectively required to answer; that is to say—

"1. Whether, etc.

"2. Whether, etc."

Rule 44.

What interrogatories need not be answered.—A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

Rule 45.

No special replication.—No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same, with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

Rule 46.

New or supplemental answer.—In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer, on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer.

Rule 47.

Proper parties, when not necessary.—In all cases where it shall appear to the court that persons, who might otherwise be

deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

Rule 48.

When parties numerous.—Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

Rule 49.

Trustees, etc., as parties.—In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

Rule 50.

When heir-at-law a necessary party.—In suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make the heir-at-law a party where he desires to have the will established against him.

Rule 51.

Joint and several debtors.—In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

Rule 52.

Defect of parties in bill.—Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following, that is to say: "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

Rule 53.

Defect of parties suggested at hearing.—If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court, if it shall think fit, shall be at liberty to make a decree saving the rights of the absent parties.

Rule 54.

When party is nominal.—Where no account, payment, conveyance or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option, and if he does not appear and answer he

shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

Rule 55.

Injunction, when granted as of course.—Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be ex parte if the adverse party does not appear at the time and place ordered. In every case where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

Rule 56.

Bill of revivor in case of abatement.—Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and upon suggestion of the facts the proper process of subpœna shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived as of course.

Rule 57.

Supplemental bill, when proper.—Whenever any suit in equity shall become defective, from any event happening after the filing of the bill (as, for example, by change of interest in the par-

ties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule-day, upon proper cause shown and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead or answer thereto on the next succeeding rule-day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

Rule 58.

What need not be set forth.—It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit unless the special circumstances of the case may require it.

Rule 59.

Answer; before whom verified.—Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a state or territory.

Rule 60.

When amendable.—After an answer is put in it may be amended as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document or other small matter, and be re-sworn at any time before a replication is put in or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defences or qualifying or altering the original statements, except by special leave of the court or of a judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit. And in every case where leave is so granted, the court, or the judge granting the same, may, in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

RULE 61.

WHEN EXCEPTIONS TO BE TAKEN.—After an answer is filed on any rule-day the plaintiff shall be allowed until the next succeeding rule-day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

RULE 62.

SEPARATE ANSWERS; COSTS ON.—When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

RULE 63.

WHEN EXCEPTIONS SET DOWN FOR HEARING.—When exceptions shall be filed to the answer for insufficiency within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter before a judge of the court, and shall enter as of course, in the order-book, an order for that purpose. And if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; *provided, however*, that the court or any judge thereof may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

RULE 64.

ANSWER ON ALLOWANCE OF EXCEPTIONS.—If at the hearing the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as a matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to com-

pel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer and complying with such other terms as the court or judge may direct.

Rule 65.

When exceptions overruled.—If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

Rule 66.

Replication; when to be filed.—Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion for cause shown, allow a replication to be filed nunc pro tunc, the plaintiff submitting to speed the cause and to such other terms as may be directed.

Rule 67.

Commissions; when taken out.—After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue ex parte.

Who to name commissioners.—In all cases the commissioner or commissioners shall be named by the court, or by a judge thereof.

If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories. Ordered (December term, 1854) that the 67th rule be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term time or in vacation, to vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge thereof can now do by the said 67th rule.

NOTICE REQUIRED.—(Ordered December term, 1861.) Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill and answer, if any ; and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted, as near as may be, in the mode now used in common-law courts. The depositions taken upon such oral examination shall be taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances; and when completed, shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend; *provided*, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner may upon all examinations state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial or irrelevant depositions, or parts of them, as may be just.

ATTENDANCE OF WITNESSES.—In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

NOTICE OF TAKING.—Notice shall be given by the respective counsel or solicitors, to the opposite counsel or solicitors or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

TRANSMISSION OF DEPOSITION.—When the examination of witnesses before the examiner is concluded, the original deposition, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record in the same mode as prescribed in the thirtieth section of act of Congress, September 24, 1789. (See Revised Statutes, § 865.)

TESTIMONY; HOW TAKEN.—Testimony may be taken on commission in the usual way by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge.

COURT MAY ASSIGN THE TIME OF TAKING.—Where the evidence to be adduced in a cause is to be taken orally, as provided in the order passed at the December term, 1861, amending the 67th General Rule, the court may, on motion of either party, assign a time within which the claimant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defence, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause unless by agreement of the parties, or by leave of court first obtained on motion for cause shown.

RULE 68.

TESTIMONY BY DEPOSITION AFTER ISSUE.—Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

RULE 69.

TIME ALLOWED.—Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either

party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions, containing the testimony, into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances. But, by consent of the parties, publication of the testimony may at any time pass in the clerk's office, such consent being in writing, and a copy thereof entered in the order-books, or indorsed upon the deposition or testimony.

Rule 70.

When taken; notice.—After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any of them is a single witness to a material fact, the clerk of the court shall as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses de bene esse upon giving due notice to the adverse party of the time and place of taking his testimony.

Rule 71.

The last interrogatory.—The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

Rule 72.

Defendant to answer original bill.—Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto, before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the

hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

RULE 73.

ACCOUNT OF PERSONAL ESTATE OF DECEASED.—Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

RULE 74.

REFERENCE; DUTY OF THE MASTER.—Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule-day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

RULE 75.

MASTER TO ASSIGN TIME AND PLACE.—Upon every such reference it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed ex parte, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay; and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reasons for any delay.

RULE 76.

REPORT; WHAT SHALL NOT BE STATED.—In the reports made by the master to the court no part of any state of facts, charge, affi-

davit, deposition, examination or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination or answer shall be identified, specified and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination or answer were so brought in or used.

Rule 77.

Proceedings before master.—The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers and other documents applicable thereto; and also to examine on oath, viva voce, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by deposition, according to the acts of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

Rule 78.

Witnesses, how summoned.—Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or to give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending or for re-

fusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses viva voce when produced in open court, if the court shall, in its discretion, deem it advisable.

RULE 79.

ACCOUNTS, PRODUCTION, EXAMINATION OF PARTY.—All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party viva voce, or upon interrogatories in the master's office, or by deposition, as the master shall direct.

RULE 80.

AFFIDAVITS, MAY BE USED.—All affidavits, depositions and documents which have been previously made, read or used in the court upon any proceeding in any cause or matter, may be used before the master.

RULE 81.

EXAMINATION OF CREDITOR OR CLAIMANT.—The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or viva voce, or in both modes as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

RULE 82.

APPOINTMENT OF MASTERS AND COMPENSATION.—The circuit courts appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master pro hac vice in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the

compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same if, upon notice thereof, he does not pay it within the time prescribed by the court.

Rule 83.

When may be filed.—The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order-book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired. If the exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held thereafter by adjournment or otherwise.

Rule 84.

Costs on exceptions.—And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs—the costs to be fixed in each case by the court, by a standing rule of the circuit court.

Rule 85.

Correction of mistakes.—Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

Rule 86.

What decrees need not contain pleadings.—In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the

case may be) at this time, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:" [Here insert the decree or order.]

Rule 87.

Guardians, how appointed.—Guardians ad litem to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their prochein ami; subject, however, to such orders as the court may direct for the protection of infants and other persons.

Rule 88.

Petition, what to contain.—Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

Rule 89.

Rules may be made by circuit courts.—The circuit courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

Rule 90.

Practice.—In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveni-

ences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

Rule 91.

Affirmation in lieu of oath.—Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

Rule 92.

Decree in foreclosure suits.—In suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the 8th rule of this court regulating the equity practice, where the decree is solely for the payment of money.

Rule 93.

Appeal in injunction cases; discretion.—When an appeal from a final decree in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

RULES OF PRACTICE

FOR THE

COURTS OF THE UNITED STATES

IN

ADMIRALTY AND MARITIME JURISDICTION, ON THE INSTANCE SIDE OF THE COURT, IN PURSUANCE OF THE ACT OF THE 23D OF AUGUST, 1842, CHAPTER 188.

Rule 1.

Process, issue and service of.—No mesne process shall issue from the district courts in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of information, shall be filed in the clerk's office from which such process is to issue. All process shall be served by the marshal, or by his deputy, or where he or they are interested, by some discreet and disinterested person appointed by the court.

Rule 2.

In suits in personam.—In suits in personam the mesne process may be by a simple warrant of arrest of the person of the defendant in the nature of a capias, or by a warrant of arrest of the person of the defendant, with a clause therein that, if he cannot be found, to attach his goods and chattels to the amount sued for; or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or by a simple monition, in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect.

Rule 3.

Bail, summary process.—In all suits in personam where a simple warrant of arrest issues and is executed, the marshal may

take bail, with sufficient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in any appellate court. And upon such bond or stipulation summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

Rule 4.

Attachment, when dissolved.—In all suits in personam where goods and chattels, or credits and effects, are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant, whose property is so attached, giving a bond or stipulation, with sufficient sureties, to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

Rule 5.

Bonds or stipulations.—Bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or any commissioner of the United States authorized by law to take bail and affidavits in civil cases.

Rule 6.

Reduction of bail; new sureties.—In all suits in personam where bail is taken the court may upon motion, for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if

either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court to be given, upon motion and due proof thereof.

Rule 7.

Warrant of arrest may issue.—In suits in personam no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court, upon affidavit or other proper proof showing the propriety thereof.

Rule 8.

Ship's tackle, etc , how obtained.—In all suits in rem against a ship, her tackle, sails, apparel, furniture, boats or other appurtenances, if such tackle, sails, apparel, furniture, boats or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or other proper officer, if, upon the hearing, the same is required by law and justice.

Rule 9.

Cases of seizure, process in.—In all cases of seizure, and in other suits and proceedings in rem, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods or other thing into his possession for safe custody, and shall cause public notice thereof, and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

Rule 10.

Perishable goods may be sold.—In all cases where any goods or other things are arrested, if the same are perishable or are liable

to deterioration, decay or injury by being detained in custody pending the suit, the court may, upon the application of either party, in its discretion, order the same or so much thereof to be sold as shall be perishable or liable to depreciation, decay or injury; and the proceeds, or so much thereof as shall be a full security to satisfy in decree, to be brought into court to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him, upon a due appraisement to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties in such sum as the court shall direct, to abide by and pay the money awarded by the final decree rendered by the court or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

Rule 11.

Ship; delivery to claimant.—In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him, upon a due appraisement to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties as aforesaid; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court, or otherwise disposed of as it may deem most for the benefit of all concerned.

Rule 12.

Suits by material-men.—In all suits by material-men for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam.

Rule 13.

Suits for mariners' wages.—In all suits for mariners' wages the libellant may proceed against the ship, freight and master, or against the ship and freight, or against the owner or the master alone in personam.

Rule 14.

Suits for pilotage.—In all suits for pilotage the libellant may proceed against the ship and master, or against the ship, or against the owner alone, or the master alone, in personam.

Rule 15.

Suits for damage by collision.—In all suits for damage by collision the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone, in personam.

Rule 16.

Suits for assault and battery.—In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be in personam only.

Rule 17.

Suits for hypothecation.—In all suits against the ship or freight founded upon a mere maritime hypothecation, either express or implied, of the master for moneys taken up in a foreign port for supplies or repairs, or other necessaries for the voyage, without any claim of marine interest, the libellant may proceed either in rem or against the master or the owner alone in personam.

Rule 18.

Suits on bottomry bonds in rem and in personam.—In all suits on bottomry bonds, properly so called, the suit shall be in rem only against the property hypothecated, or the proceeds of the property, in whosesoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be in personam against the wrongdoer.

Rule 19.

Suits for salvage.—In all suits for salvage the suit may be in rem against the property saved, or the proceeds thereof, or in per-

sonam against the party at whose request and for whose benefit the salvage service has been performed.

Rule 20.

In petitory and possessory suits.—In all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship, or the majority thereof, against the master of a ship for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship and by a monition to the adverse party or parties to appear and make answer to the suit.

Rule 21.

Decrees, remedy on.—In all cases of a final decree for the payment of money the libellant shall have a writ of execution, in the nature of a fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the defendant or stipulators.

Rule 22.

Informations and libels on seizures.—All informations and libels of information upon seizures for any breach of the revenue or navigation or other laws of the United States shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return day of the process why the forfeiture should not be decreed.

Rule 23.

Libels, civil and maritime, in instance causes.—All libels in instance causes, civil or maritime, shall state the nature of the cause; as, for example, that it is a cause, civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be; and if the libel be in rem, that the property is within the district; and if in personam, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of due process to enforce his rights in rem or in personam (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.

Rule 24.

Amendments to libels, when of course.—In all informations and libels in causes of admiralty and maritime jurisdiction, amendments, in matters of form, may be made at any time on motion to the court as of course. And new counts may be filed, and amendments, in matters of substance, may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.

Rule 25.

Security for costs, when required.—In all cases of libels in personam the court may, in its discretion, upon the appearance of the defendant, where no bail has been taken and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation, with sureties in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against him in the suit, upon the final adjudication thereof or by any interlocutory order in the progress of the suit.

Rule 26.

When the claim must be verified.—In suits in rem the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and bona fide owner, and that no other person is the owner thereof. And where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And upon putting in such claim, the claimant shall file a stipulation, with sureties in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or, upon an appeal, by the appellate court.

Rule 27.

Answer must be verified.—In all libels in causes of civil and maritime jurisdiction, whether in rem or in personam, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation; and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel. (See Rule 48.)

Rule 28.

Exception to answer.—The libellant may except to the sufficiency, or fullness, or distinctness, or relevancy of the answer to the articles and interrogatories in the libel; and if the court shall adjudge the same exceptions, or any of them, to be good and valid, the court shall order the defendant forthwith, within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

Rule 29.

Default for want of answer, effect of.—If the defendant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and there-

upon the libel shall be adjudged to be taken pro confesso against him, and the court shall proceed to hear the cause ex parte and adjudge therein as to law and justice shall appertain. But the court may, in its discretion, set aside the default, and, upon the application of the defendant, admit him to make answer to the libel at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

Rule 30.

When further answer required.—In all cases where the defendant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken pro confesso against the defendant to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

Rule 31.

What allegation need not be answered.—The defendant may object, by his answer, to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for a crime, or for any penalty or any forfeiture of his property for any penal offence.

Rule 32.

Personal answers to interrogatories propounded in answer.—The defendant shall have a right to require the personal answer of the libellant, upon oath or solemn affirmation, to any interrogatories which he may, at the close of his answer, propound to the libellant touching any matters charged in the libel, or touching any matter of defence set up in the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution or punishment or forfeiture, as is provided in the 31st rule. In default of due answer by the libellant to such interrogatories, the court may adjudge the libellant to be in default and dismiss the libel, or may compel his answer in the premises by attachment, or take the subject-matter of the interrogatory pro

confesso in favor of the defendant, as the court, in its discretion, shall deem most fit to promote public justice.

Rule 33.

Verification of answer to interrogatory, when dispensed with.—Where either the libellant or the defendant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

Rule 34.

Intervention in rem; how to proceed.—If any third person shall intervene in any cause of admiralty and maritime jurisdiction in rem for his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, upon filing his allegations, to give a stipulation, with sureties, to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

Rule 35.

Stipulations, how given.—The stipulations required by the last preceding rule, or on appeal, or in any other admiralty or maritime proceeding, shall be given and taken in the manner prescribed by Rule 5 as amended.

Rule 36.

Effect of allowance of exceptions.—Exceptions may be taken to any libel, allegation or answer, for surplusage, irrelevancy, impertinence or scandal; and if, upon reference to a master, the

exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged at the cost and expense of the party in whose libel or answer the same is found.

Rule 37.

Attachment against garnishee.—In cases of foreign attachment the garnishee shall be required to answer on oath or solemn affirmation as to the debts, credits or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process in personam against him. If he admits any debts, credits or effects, the same shall be held in his hands, liable to answer the exigency of the suit.

Rule 38.

Property brought into court.—In cases of mariners' wages, or bottomry, or salvage, or other proceedings in rem, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit; and upon failure of the party to comply with the order, may award an attachment or other compulsive process to compel obedience thereto.

Rule 39.

Non-appearance of libellant.—If, in any admiralty suit, the libellant shall not appear and prosecute his suit, according to the course and orders of the court, he shall be deemed in default and contumacy, and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

Rule 40.

Decree may be rescinded.—The court may, in its discretion, upon the motion of the defendant and the payment of costs, rescind

the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

Rule 41.

Sales of property.—All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

Rule 42.

Moneys deposited.—All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out except by check or checks, signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all the checks so drawn and the date thereof.

Rule 43.

Intervenor for proceeds.—Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceeding, to intervene pro interesse suo for a delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or, upon a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

Rule 44.

Reference to commissioners.—In cases where the court shall deem it expedient or necessary for the purposes of justice, the court

may refer any matters arising in the progress o the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in references to them, including the power to administer oaths to and to examine the parties and witnesses touching the premises.

Rule 45.

Appeals, when made.—All appeals from the district to the circuit court must be made while the court is sitting, or within such other period as shall be designated by the district court by its general rules or by an order specially made in the particular suit, or in case no such rule or order be made, then within thirty days from the rendering of the decree.

Rule 46.

Courts to regulate practice.—In all cases not provided for by the foregoing rules the district and circuit courts are to regulate the practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty.

Rule 47.

Bail, when taken.—In all suits in personam where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the state where an arrest is made upon similar or analogous process issuing from the state courts.

Imprisonment for debt.—And imprisonment for debt, on process issuing out of the admiralty court, is abolished in all cases where, by the laws of the state in which the court is held, imprisonment for debt has been or shall be hereafter abolished, upon similar or analogous process issuing from a state court.

Rule 48.

Answer, sufficiency of.—The 27th rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless the district court hall be of opinion that

the proceedings prescribed by that rule are necessary for the purposes of justice in the case before the court.

All rules and parts of rules heretofore adopted inconsistent with this order are hereby repealed and annulled.

Rule 49.

Further proof, how taken on appeal.—Further proof taken in a circuit court upon an admiralty appeal shall be by deposition taken before some commissioner appointed by a circuit court pursuant to the acts of Congress in that behalf, or before some officer authorized to take depositions by the 30th section of the act of Congress of the 24th of September, 1789 (see Revised Statutes, § 865), upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion, allow a commission to issue to take such depositions upon written interrogatories and cross-interrogatories. When such deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party to be present at the taking of the same, and to put interrogatories, if he think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified not less than twenty-four hours, and in addition thereto one day, Sundays exclusive, for every twenty miles' travel; *provided*, that the court in which such appeal may be pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above required.

Rule 50.

Oral evidence, when admissible on appeal.—When oral evidence shall be taken down by the clerk of the district court pursuant to the above-mentioned section of the act of Congress, and shall be transmitted to the circuit court, the same may be used in evidence on the appeal, saving to each party the right to take the depositions of the same witnesses, or either of them, if he should so elect.

Rule 51.

New facts in answer.—When the defendant, in his answer, alleges new facts, these shall be considered as denied by the libellant,

and no replication, general or special, shall be allowed. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libellant may amend his libel so as to confess and avoid, or explain, or add to the new matters set forth in the answer; and within such time as may be fixed in like manner, the defendant shall answer such amendments.

Rule 52.

1. Records on appeal.—The clerks of the district courts shall make up the records to be transmitted to the circuit courts on appeals, so that the same shall contain the following:

1. The style of the court.

2. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.

3. If bail was taken, or property was attached or arrested, the process of the arrest or attachment and the service thereof, all bail and stipulations, and, if any sale has been made, the orders, warrants and reports relating thereto.

4. The libel, with the exhibits annexed thereto.

5. The pleadings of the defendant, with the exhibits annexed thereto.

6. The testimony on the part of the libellant, and any exhibits not annexed to the libel.

7. The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.

8. Any order of the court to which exception was made.

9. Any report of an assessor or assessors, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the assessor, are to be stated.

10. The final decree.

11. The prayer for an appeal and the action of the district court thereon; and no reasons of appeal shall be filed or inserted in the transcript.

The following shall be omitted:

1. The continuances.

2. All motions, rules and orders not excepted to which are merely preparatory for trial.

3. The commissions to take depositions, notices therefor, their captions and certificates of their being sworn to, unless some exception to a deposition in the district court was founded on some one or more of these; in which case so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness, and to copy the interrogatories and answers, and to state the name of the commissioner and the place where and the date when the deposition was sworn to; and in copying all depositions taken on interrogatories the answer shall be inserted immediately following the question.

2. CERTIFICATE OF CLERK.—The clerk of the district court shall page the copy of the record thus made up, and shall make an index thereto, and he shall certify the entire document, at the end thereof, under the seal of the court, to be a transcript of the record of the district court in the cause named at the beginning of the copy made up pursuant to this rule; and no other certificate of the record shall be needful or inserted.

RULE 53.

CROSS-LIBEL, SECURITY FOR COSTS BY RESPONDENT.—Whenever a cross-libel is filed upon any counter-claim arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security, in the usual amount and form, to respond in damages as claimed in said cross-libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given.

RULE 54.

LIBEL OR SUIT FOR EMBEZZLEMENT OF MASTER.—When any ship or vessel shall be libelled, or the owner or owners thereof shall be sued for any embezzlement, loss or destruction by the master, officers, mariners, passengers or any other person or persons, of any property, goods or merchandise shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred without the privity or knowledge of such owner or owners,

and he or they shall desire to claim the benefit of limitation of liability provided for in the 3d and 4th sections of the said act above recited, the said owner or owners shall and may file a libel or petition in the proper district court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation with sureties for payment thereof into court, whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the 4th section of said act; and upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice served through the post-office, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

Rule 55.

Proof of claims before commissioner.—Proof of all claims which shall be presented in pursuance of said monition shall be made before a commissioner to be designated by the court, subject to the right of any person interested to question or controvert the same; and upon the completion of said proofs, the commissioner shall make report of the claims so proven, and upon confirmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expenses), shall be

divided pro rata amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

Rule 56.

Who may defend.—In the proceedings aforesaid the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel, for said embezzlement, loss, destruction, damage or injury (independently of the limitation of liability claimed under said act); *provided*, that in his or their libel or petition he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability or to a limitation of liability under the said act of Congress, or both.

Rule 57.

Where libel or petition must be filed; jurisdiction, where it attaches.—The said libel or petition shall be filed and the said proceedings had in any district court of the United States in which said ship or vessel may be libelled to answer for any such embezzlement, loss, destruction, damage or injury; or if the said ship or vessel be not libelled, then in the district court for any district in which the said owner or owners may be sued in that behalf. If the ship have already been libelled and sold, the proceeds shall represent the same for the purposes of these rules.

RULES OF THE COURT OF CLAIMS.

TOOK EFFECT JULY 1, 1879.

Article I.—Attorneys and Counsel.

Suits, by whom commenced; when power of attorney to be filed.—*Sec.* 1. Suits may be commenced by the claimant in person, or through his attorney in fact, or an attorney of this court. If the claimant is represented by an attorney in fact, the power must be filed with the clerk, and its execution must be proved or acknowledged before an officer authorized to take acknowledgments of deeds.

Qualifications for admission as attorneys.—*Sec.* 2. Any person of good moral character, who has been admitted to practice in the Supreme Court of the United States, or in the highest court of the District of Columbia, or in the highest court of any state or territory, may be admitted, on motion in open court, to practice as an attorney and counsellor of this court.

Admission of person as attorney in vacation.—*Sec.* 3. An attorney-at-law licensed to practice in the courts of record of any state or territory may file an affidavit made before a person authorized to administer oaths under the laws of the United States, showing when, where and in what courts he has been admitted, and that he is still entitled to practice therein. Upon such an affidavit the court, or the Chief Justice or one of the judges in vacation, will direct an order admitting such attorney to practice as an attorney in this court. But this will not authorize the party to appear in open court till there admitted as before provided.

Only one attorney of record allowed; changes permitted.—*Sec.* 4. There shall be but one attorney of record for the claimant in any case at any one time; but a claimant may be permitted to change his attorney, on such conditions as the court may prescribe. A firm of attorneys will be regarded as the attorney of record.

Attorney of record to sign pleadings, etc.—*Sec.* 5. Petitions, pleadings and motions on the part of the claimant will be

signed by the attorney of record; pleadings and motions on the part of the United States by the Assistant Attorney-General.

POST-OFFICE ADDRESS OF CLAIMANT OR ATTORNEY TO BE REGISTERED.—*Sec.* 6. Attorneys of record, or the claimant if he appear in person, will, on commencing or appearing in a suit, register with the clerk of the court a post-office address, to which all notices required by these rules or ordered by the court may be addressed.

COUNSEL.—*Sec.* 7. Counsel, other than the attorney of record, may be heard on either side at the trial or in any stage of the proceedings, but shall not be entitled to file pleadings, give notices or make motions.

ARTICLE II.—THE PETITION.

FILING OF PETITION AND OF TWENTY-FIVE PRINTED COPIES.—*Sec.* 1. Suits will be commenced by petition, verified in the manner provided by law, and filed in the office of the clerk. The clerk will note the day of the filing of the petition thereon. Within twenty days thereafter the claimant will file in the clerk's office twenty-five printed copies of such petition and note of filing.

CONTENTS OF PETITION.—*Sec.* 2. The petition must set forth—

1. The title of the action, with the full Christian and surnames of all the claimants.

2. A plain, concise statement of the facts and circumstances, giving place and date, free from argumentative and impertinent matter.

3. The prayer, in which the claimant must state distinctly the amount for which he demands judgment, or the relief for which he prays.

IMPERFECT PETITION, WHEN MAY BE FILED.—*Sec.* 3. When the claimant cannot state his case with the requisite particularity without an examination of papers in one of the executive departments, and has been unable to obtain a sufficient examination of such papers on application, he may file a petition stating his claim as far as is in his power, and specifying as definitely as he can the papers he requires in order to enable him to state his claim. The court will thereupon call upon the proper department for such information or papers as it may deem necessary; and when the same are furnished, the petition may be amended, and the amended petition shall be printed and filed, and may take the place of the original petition.

APPOINTMENT OF EXECUTOR, ETC., HOW PROVED.—*Sec.* 4. If the claimant be an executor, administrator, guardian or other representative appointed by a judicial tribunal, a duly-authenticated copy of the record of the appointment must be filed with the petition at the commencement of the action.

ACTS AND REGULATIONS TO BE SPECIFIED.—*Sec.* 5. If the claim be founded upon an act of Congress or upon a regulation of an executive department, the act and the section thereof upon which the claimant relies must be specified, and the particular regulation of the department must be stated in terms.

CONTRACTS, HOW STATED.—*Sec.* 6. If the claim be founded upon an express contract with the United States, such contract must be set forth in the petition, and, if it be in writing, must be annexed thereto. If it be founded upon an implied contract, the circumstances upon which the claimant relies to prove a contract must be specified. If it consist of several matters or items, each must be separately stated.

AGENT VERIFYING PETITION MUST HAVE POWER OF ATTORNEY.—*Sec.* 7. If the petition be verified by the attorney at law or other agent of the claimant, a power of attorney authorizing him to make the verification must be filed with it.

AMENDMENT OF PETITION.—*Sec.* 8. If a claimant desire to amend his petition at any time, he must set forth in his motion the specific amendments desired. If the motion be allowed, he must within twenty days thereafter file a copy of the petition, with the amendments properly incorporated therein, unless the court order otherwise.

DEATH OF CLAIMANT.—*Sec.* 9. If the claimant die pending the suit, his death may be suggested on the record, and his proper representative may, on motion, and on filing a duly-authenticated copy of the record of his appointment as executor or administrator, be admitted to prosecute the suit.

ARTICLE III.—PLEAS.

WHEN PLEAS MUST BE FILED.—*Sec.* 1. Demurrers to petitions and general traverses thereof must be filed within two months after the filing of the petition; and pleas averring special defence, set-off or counter-claim, within one month after the claimant places his case on the notice-book.

GROUNDS OF DEMURRER.—*Sec.* 2. When the Attorney-General demurs to the petition, he must set forth the grounds of the demurrer specially; but if the ground be that the petition does not allege facts sufficient to constitute a cause of action, that objection may be stated generally.

REPLICATION TO SET-OFF, ETC.—*Sec.* 3. Within one month after the filing of a set-off or counter-claim by the defendants, the claimant must answer the same by replication under oath; in default whereof the court may, after ten days' notice by the defendants to the claimant, order that the set-off or counter-claim be considered as admitted.

PLEA OF FRAUD.—*Sec.* 4. When the Attorney-General pleads, under section 1086 of the Revised Statutes, that the claimant has practiced or attempted to practice fraud, he shall set forth the facts with sufficient particularity to enable the claimant to answer the same in detail; and the claimant shall, within two months after the filing of said plea, reply to the same with like particularity, under oath.

ARTICLE IV.—MOTIONS.

MOTIONS TO BE FIRST HEARD AT CHAMBERS.—*Sec.* 1. Motions will be heard in the first instance before a judge at chambers; but he may direct the same to be heard in open court. They must come to him through the clerk's office, and, when acted upon, will be returned there by him.

FORM OF MOTIONS.—*Sec.* 2. Motions must be in writing, signed by the attorney of record, and must give the title and number of the case and the term at which they are made; and in no case shall the clerk enter the motion unless this rule be complied with.

WHEN ORDERS TO BE ENTERED OF RECORD.—*Sec.* 3. No order will be entered by the clerk unless it be directed from the bench, or be reduced to writing and marked "allowed" by the Chief Justice or one of the judges.

PAPERS TO BE INDORSED BEFORE FILING.—*Sec.* 4. The clerk will not file any paper unless it be properly indorsed with the title and number of the suit and the name of the attorney filing it.

ARTICLE V.—SERVICE OF NOTICES.

SERVICE MADE THROUGH CLERK'S OFFICE; COMPUTATION OF TIME.—*Sec.* 1. Parties filing petitions, pleadings and motions, ex-

cept motions for calls on departments, must at the same time leave with the clerk written notice thereof, addressed to the attorney of the adverse party, with postage prepaid, and the clerk will mail the same and note the fact on the general docket. All other notices to adverse parties may be served in like manner. The clerk's entry on his docket will be *prima facie* evidence of the service. In the computation of time the day of the service will be excluded, and the day on which a party is required to appear, or on which an act is required to be done, will be included.

Article VI.—Witnesses.

Evidence may be taken before issue joined.—*Sec.* 1. When a petition is filed, either party may proceed to take testimony, notwithstanding that issue of fact has not been joined or that issue on demurrer may be pending.

Testimony to be in depositions; officers who may take depositions.—*Sec.* 2. Unless the court order a witness to testify orally on the trial, the evidence of witnesses must be by deposition, taken either before a commissioner of the court, or a judge of a court of the United States, or a judge of a court of record in a state or territory of the United States, or a commissioner appointed by a circuit court of the United States, or a notary public.

When depositions may be taken before a judge of this court.—*Sec.* 3. When a witness can be conveniently examined before a judge of this court, either party, at any time prior to the examination, may move for an order directing that his deposition be so taken.

Proceedings against witness in contempt.—*Sec.* 4. If a witness, having been duly summoned and his fees tendered him, shall fail or refuse to appear and testify before any officer authorized to take his testimony, a rule upon him will be issued by the court, on motion, to show cause why a fine should not be imposed upon him; and if he fail to show sufficient cause, he shall be fined not exceeding one hundred dollars.

Fees of witnesses.—*Sec.* 5. The fees of witnesses shall be such as are now or may hereafter be prescribed by Congress, and shall be paid by the party at whose instance the witnesses appear.

Witness may be examined in court.—*Sec.* 6. The court may remand any case to the docket and order a witness or a claimant to

be produced before the court or one of the judges thereof for examination.

Article VII.—Depositions on Written Interrogatories.

Depositions in foreign countries.—*Sec.* 1. Depositions obtained in foreign countries must be taken on written interrogatories, sent out under a special commission issued by the clerk. Depositions may be taken in like manner within the United States, by consent of parties, or when authorized by the court or by a judge in vacation. The written interrogatories must be filed in the clerk's office and notice thereof given to the adverse party. Within fifteen days after such notice, the adverse party may file objections to any of the interrogatories, specifically stating the grounds of objection; and may either file cross-interrogatories, or a notice that he will cross-examine the witnesses orally; which notice shall be attached to and sent out with the special commission. If he file cross-interrogatories, the other party may, within fifteen days thereafter, file objections thereto, specifically stating the grounds of objection. No objections to an interrogatory or a cross-interrogatory will be considered at the trial unless taken before the commission issues.

Parties not to be present at taking.—*Sec.* 2. When a disposition is taken upon written interrogatories and written cross-interrogatories, neither the Attorney-General, nor the claimant, his agent or attorney, nor any other person, shall be present at the examination of the witness; which fact shall be certified by the officer taking the deposition; who shall, in such cases, propound the interrogatories and cross-interrogatories to the witness in their order, and reduce his answers to writing as nearly as practicable in his precise words.

Article VIII.—Depositions on Oral Examination.

Notice for taking depositions on oral examination.—*Sec.* 1. The party proposing to take depositions on oral examination shall cause fifteen days' notice to be given thereof to the other party. The notice must be in writing, and state the names of the witnesses to be examined, the day of the month, the hour, and the place of taking the deposition. When the claimant proposes to take a deposition, and the witness resides more than five hundred miles from Washington, or when the defendants propose to take the

deposition, and the witness resides more than five hundred miles from the claimant or his attorney, one day's further notice shall be given for every additional hundred miles.

NOTICE WHEN DEPOSITION IS TO BE TAKEN IN WASHINGTON.—*Sec.* 2. If the claimant proposes to take a deposition in the city of Washington, three days' notice shall be sufficient; and a like notice by the defendants shall be sufficient when the claimants' attorney resides in the city of Washington.

QUESTIONS AND ANSWERS TO BE RECORDED.—*Sec.* 3. When a deposition is taken by oral examination, each question propounded to the witness must be recorded, and his answers must be taken down, as nearly as may be, in his own words.

OBJECTIONS TO QUESTIONS.—*Sec.* 4. No general objection to any question shall be noticed by the officer; but where an objection is made on specifically stated grounds, the officer shall record the same in direct connection with the question objected to.

WHEN WITNESSES NOT NAMED IN THE NOTICE MAY BE EXAMINED.—*Sec.* 5. When depositions are taken on notice, as provided in section 1 of this article, if both parties are present or represented at the time and place specified in the notice, either party may, after the examination of the witnesses produced under the notice, be entitled to produce and examine other witnesses; but in order thereto one day's notice must be given to the adverse party, or his attorney, there present.

ARTICLE IX.—GENERAL PROVISIONS AS TO DEPOSITIONS.

OF THE OATH; GENERAL INTERROGATORIES.—*Sec.* 1. Witnesses must be sworn or affirmed, before any questions are put to them, to tell the truth, the whole truth, and nothing but the truth, relative to the cause in which they are to testify; and each witness shall then state his name, his occupation, his age if under twenty-one years, his place of residence; whether he has any, and if any, what, interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, he is related to the claimant. At the conclusion of the deposition, the witness shall state whether he knows of any other matter relative to the claim in question; and if he do, he shall state it. The testimony of the witness when completed shall be read over to him, and be signed by him in the presence of the officer.

SHEETS OF DEPOSITIONS, HOW PUT TOGETHER.—*Sec.* 2. The officer should so connect the sheets of the deposition that they cannot be tampered with, and should return them sealed together. He should sign, and make the witness sign, each sheet; and generally he should spare so pains to return to the court the exact evidence he has taken. All exhibits should be carefully marked so as to be capable of immediate identification, and, when practicable, should be attached to the deposition under seal.

CAPTION OF DEPOSITION.—*Sec.* 3. The officer must state, in the caption of the deposition, the cause in which it was taken, the place and date of taking, the name of the witness, the party by whom called, and the names of the parties and counsel present. And in the body of the deposition must also be shown by whom the witness was examined and cross-examined.

WHAT THE OFFICER'S RETURN MUST SHOW.—*Sec.* 4. In his return the officer must show that the witness was properly sworn or affirmed, and that the answers were taken down in his presence, and read over to and signed by the witness.

RETURN OF DEPOSITION.—*Sec.* 5. The officer must inclose the commission, depositions and exhibits in a packet, under his seal, and direct the same to the clerk of the court at Washington, and deposit the packet in the post-office, or in an express-office, or he may transmit the same by a messenger, whose name shall be by him indorsed on the packet.

OFFICER'S FEES TO BE PAID BEFORE OPENING THE DEPOSITION. —*Sec.* 6. If the officer's fees be not paid at the time of taking the deposition, he should indorse on the outside of the packet the gross amount of his fees and disbursements, and inclose inside a detailed statement thereof. The packet must not be opened until the party for whom the depositions were taken deposits with the clerk the amount indorsed thereon. The clerk will then open the packet, and tax the officer's charges at the rates hereinafter provided, and will immediately transmit to him the amount taxed, returning the overplus, if any, to the party. The money will be transmitted by draft or registered letter, and the clerk will retain his vouchers therefor.

FEE LIST.—*Sec.* 7. The fees shall be three dollars a day for attending to take the depositions, and twenty cents a folio of one hundred words for taking and returning it; but this *per diem* al-

lowance is limited to one day for a deposition or series of depositions taken in the same case. Short-hand reporters, acting as special commissioners, will receive, in addition to these fees, ten cents a folio for writing out the deposition from their notes.

EXCESSIVE CHARGES.—*Sec.* 8. Any permanent commissioner charging in excess of the prescribed fees, except under a previous written agreement with the parties, will be deemed guilty of improper and illegal conduct, and his commission will be revoked.

OBJECTIONS TO NOTICE, FORMS, ETC.; WHEN TO BE MADE.—*Sec.* 9. Objections to the notice, or the form and manner of taking or returning the testimony, must be made in writing, and filed within one month after notice of the filing of the deposition, or they will be considered as waived.

ARTICLE X.—EVIDENCE CERTIFIED FROM THE DEPARTMENTS.

ATTORNEY-GENERAL MAY GIVE IN EVIDENCE CERTIFIED PAPERS. —*Sec.* 1. The Attorney-General may offer in evidence properly-certified information and papers from any executive department, without calling for the same under the provisions of section 1076 of the Revised Statutes. A call for such information and papers will be made at a claimant's request, on the approval of a judge in chambers. On the receipt of an answer to the call, the clerk will notify the claimant's counsel and the Attorney-General by post.

OBJECTIONS TO PAPERS, ETC., WHEN TO BE MADE.—*Sec.* 2. All information or papers furnished by an executive department in response to a call, or through the Attorney-General, is subject to objection by either party according to the rules of evidence at the common law; but neither party will be required to produce the originals of such papers, or to prove their execution, unless within one month after the return is filed the party objecting to such papers enter of record in the clerk's office a written denial of their genuineness.

OFFICIAL CHARACTER OF OFFICER, WHEN TO BE PROVED.—*Sec.* 3. Whenever it is charged in a petition that a contract has been made or other liability incurred through an officer or agent of the United States, other than the head of an executive department or the chief of a bureau, the claimant will be required to prove that such person was an officer or an agent of the United States, by the cer-

tificate of the proper executive department, or by other legal and sufficient evidence.

OFFICIAL PAPERS FILED IN ONE CAUSE MAY BE USED IN ANOTHER.—*Sec.* 4. Any information or papers certified from any executive department, and filed in any cause, may be used and applied in any other pending cause to which the same may be applicable or pertinent. To entitle such information or papers to be so used, copies thereof must be filed in such other cause before the same shall have been placed on the trial docket.

ARTICLE XI.—PRODUCTION OF ORIGINAL PAPERS BY THE CLAIMANT.

ORDER FOR PRODUCTION OF PAPERS BY CLAIMANTS.—*Sec.* 1. The court may, at the instance of the Attorney-General, order any claimant, his agent or attorney, to produce in court, or before any officer authorized to take depositions, any letters, papers, deeds, documents or other writings in his possession or subject to his control, in any way relating to the claim sued upon; and any claimant, his agent or attorney, who, after due notice, refuses to produce such letters, papers, deeds, documents or other writings, when in his power to do so, shall be subject to attachment for contempt; and if he persist in such refusal, the court will direct the petition to be dismissed.

ARTICLE XII.—BRIEFS AND REQUESTS FOR FINDINGS OF FACT.

CLOSE OF CLAIMANT'S PROOF.—*Sec.* 1. The claimant may at any time give notice to the Attorney-General that his proof is closed, by an entry to that effect in the notice-book in the clerk's office. If the Attorney-General shall not within two months thereafter file a request for further time to take proof, the claimant may, at any time after the expiration of that period, have the case placed on the trial list.

PRINTED COPIES OF CLAIMANT'S BRIEF AND REQUESTS FOR FINDINGS TO BE FILED.—*Sec.* 2. The clerk shall not place a case on the trial list until the claimant files in the clerk's office twenty-five printed copies of a brief stating the points of law on which he relies, with references to authorities, and twenty-five printed copies of the request for facts required by Rule 5 of the "Regulations

prescribed by the Supreme Court of the United States under which appeals may be taken from the Court of Claims."

FORMS OF REQUESTS FOR FINDINGS.—*Sec.* 3. Such request must be in the following terms: "*The claimant, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this case in the findings of fact, requests the court to find the same, as follows.*"

Following this request must be a statement, in the form of distinct numbered propositions, of the facts which the party desires to have found; and each proposition must be so prepared, with respect to its length, subject and phraseology, that the court may conveniently pass upon it; and they must be so arranged as to present a concise statement, in orderly and logical sequence, of the whole case, as the party desires it to appear in the findings of fact. Subjoined to each proposition must be references to the pages of the record containing the evidence relied on in its support; but no evidence must be set out. Documents which may enter into the findings of fact need not be presented in the statement, but may be referred to therein by the pages of the record.

DEFENDANT'S BRIEF AND REQUEST.—*Sec.* 4. The Attorney-General, within one month after the filing of the claimant's brief and request, must file his brief and request for findings of fact, and should indicate the requests on the claimant's part to which no objection is made. Such request must be in form and substance like that required of the claimant by the next preceding section.

WHEN ATTORNEY-GENERAL MAY PUT CASE ON THE TRIAL LIST.—*Sec.* 5. If the claimant neglect, for two years after filing his petition, to close his proof and give notice to the Attorney-General, as required by section 1 of this article, the defendants may place the case on the trial list.

ARTICLE XII.—TRIALS AND OTHER PROCEEDINGS IN COURT.

WHEN CASE TO BE HELD READY FOR TRIAL.—*Sec.* 1. When the defendant's brief and request are filed the case will be considered as ready for trial, and, when reached, a continuance will not be ordered, except by consent of parties, or for good cause shown.

TRIAL DOCKET.—*Sec.* 2. The trial docket will be made up monthly. Cases will go upon it in the order in which notices of trial have been filed.

WHEN TRIAL DOCKET TO BE CALLED.—*Sec.* 3. The peremptory call of the trial docket will begin on the Tuesday after the first Monday of each month during the term.

CASE MAY BE SET DOWN FOR NON-RESIDENT COUNSEL.—*Sec.* 4. Cases in which counsel reside at a distance may be set down once during a term for a day certain, with the consent of the Attorney-General, without regard to their position upon the trial docket.

RECORD TO BE MADE UP IN BOOK FORM.—*Sec.* 5. No case will be heard for trial unless the printed pleadings, evidence and briefs be made up in book form together and paged consecutively, and a copy thereof furnished to each member of the court at the hearing; and all citations from or references to such pleadings, evidence and briefs must be by the consecutive paging of such book.

TABLE OF CONTENTS.—*Sec.* 6. When, in any case, the record shall be made up in book form, as required in the next preceding section, the chief clerk shall make, cause to be printed, and prefix to each copy of the record so made up, a table of the contents thereof, with references to the page where each document and each piece of evidence may be found.

LAW DOCKET.—*Sec.* 7. The law docket will be taken up on Monday of each week during the term.

ARTICLE XIV.—PRINTING.

DEPOSITIONS, HOW TO BE PRINTED.—*Sec.* 1. The testimony and briefs will be printed. In printing the testimony, the notices and the officers' captions and certificates will be omitted; but to each deposition there must be prefixed a title in the following form: *Deposition of* ——— *for claimant*, [or defendant, as the case may be] *taken at* ———, *on the* ——— *day of* ———, 18 ; *claimant's counsel*, ———; *defendants' counsel*, ———.

CALLS ON DEPARTMENTS TO BE PRINTED.—*Sec.* 2. Where an answer of a department is printed as evidence, the call for the same must be printed therewith.

MATTER NOT TO BE PRINTED.—*Sec.* 3. Before printing a return made to a call on a department, the chief clerk will withhold from the copy for the printer, 1st, all papers of which copies have been previously printed in the record of the case; and for this purpose he will compare the two copies, and if variations are found he will take the directions of a judge in chambers before sending the re-

turn to the printer; 2d, all certificates of authenticity and certificates of acknowledgment; 3d, all papers which both parties agree to omit; 4th, all papers which a judge in chambers orders to be omitted. In each case the chief clerk will make a memorandum of the omission in the copy for the printer, verified by his initials.

OBJECTIONS TO PRINTING.—*Sec.* 4. If the claimant objects to printing information or papers so returned, and the Attorney-General requests to have the same printed, the clerk will note a memorandum of such request in the copy for the printer, with his initials attached; and when such information or papers are printed, the same will be regarded as evidence offered on the part of the defence. All information and papers transmitted from a department in reply to a claimant's call, and not thus objected to by him within ten days after return of the call, will be regarded as evidence offered by the claimant.

TYPE AND SIZE OF PAGE.—*Sec.* 5. The printed papers required by these rules must be in long primer type and in royal octavo pages, and the style and number of the case must be prefixed to all printed papers and to records of evidence. A table of contents, with page references, must also be prefixed.

DEPOSITIONS, ETC., NOT TO BE TAKEN FROM CLERK'S OFFICE.—*Sec.* 6. No deposition, return or record on file shall be taken from the custody of the clerk by a claimant or his attorney, but either may attend at the clerk's office, and prepare his evidence for the press in the form and manner before prescribed. When the evidence is complete and ready for the printer, the chief clerk will have it printed at the Public Printing Office.

ARTICLE XV.—LIMITATION.

WHEN PETITION MAY BE DISMISSED ON BAR OF SIX YEARS.—*Sec.* 1. If it appear on the face of the petition that the claim first accrued more than six years before the petition was filed, the claimant must aver therein the existence and period of duration of some disability, recognized by law, which prevented his filing his petition within that time; in default whereof, it will be considered that no such disability existed, and the petition may be dismissed on motion.

WHEN PETITION MAY BE DISMISSED ON BAR OF THREE YEARS.—*Sec.* 2. If the claimant, in avoidance of the bar of limitation, aver in his petition the existence and duration of any such disability,

and it thereby appears that, after the disability ended, more than three years had elapsed before the petition was filed, the petition may be dismissed on motion.

IF PETITION DOES NOT SHOW WHEN CLAIM ACCRUED, IT MUST BE MADE CERTAIN.—*Sec.* 3. If upon the face of the petition it does not appear when the claim first accrued, the court may require the claimant to make the petition definite and certain in that regard, and in default thereof may dismiss the suit.

AVERMENTS AS TO TIME CLAIM ACCRUED PUT IN ISSUE BY GENERAL TRAVERSE.—*Sec.* 4. Averments in regard to the time when a claim first accrued, or in regard to an alleged disability of the claimant, will be held to be put in issue by the defendants' general traverse.

ARTICLE XVI.—DISCONTINUANCE.

NO DISCONTINUANCE WHEN FRAUD OR SET-OFF IS PLEADED.—*Sec.* 1. Where fraud or set-off is pleaded, the claimant shall not, without leave of the court, discontinue his suit. In other cases he may do so, either in open court, or, with the approval of a judge, in vacation.

ARTICLE XVII.—NEW TRIAL.

NEW TRIAL; WHEN NOT TO BE GRANTED.—*Sec.* 1. A new trial will not be granted where, upon the whole case, justice has been done between the parties and the judgment is substantially right, although there may have been some mistakes committed at the trial.

GROUNDS OF MOTION BY CLAIMANT FOR NEW TRIAL.—*Sec.* 2. A motion by a claimant for a new trial may be founded upon one or more of the following grounds: 1st. Error of fact; 2d. Error of law; and 3d. Newly-discovered evidence. It must be made at the term in which the judgment is rendered, and before the commencement of the long vacation.

MOTION FOUNDED ON ERROR OF FACT; WHAT TO SPECIFY.—*Sec.* 3. A motion founded upon an error of fact must specify with minuteness the fact or facts which are regarded as erroneously found or erroneously omitted to be found by the court, with full reference to the evidence which is relied on to support the motion.

MOTION FOUNDED ON ERROR OF LAW; WHAT TO SPECIFY.—*Sec.* 4. A motion founded upon error of law must specify with like

minuteness the points upon which the court is supposed to have erred, with references to the authorities relied upon to support the motion.

MOTION FOUNDED ON NEWLY-DISCOVERED EVIDENCE.—*Sec.* 5. A motion upon the ground of newly-discovered evidence will not be entertained unless it appear that the newly-discovered evidence came to the knowledge of the claimant or his attorney after the trial and before the motion was made; that it was not for want of due diligence that it did not sooner come to his knowledge; that it is so material that it would probably produce a different judgment if the new trial were granted; and that it is not cumulative. Such motion must be accompanied by the affidavit of the claimant or his attorney of record, setting forth—

1st. The facts in detail which the claimant expects to be able to prove, and whether the same are to be proved by witnesses or by documentary evidence.

2d. The name, occupation and residence of each and every witness whom it is proposed to call to prove said facts.

3d. That the said facts were unknown to either the claimant or his attorney of record, and, if other counsel was employed at the trial, were unknown to such counsel until after the close of the trial.

4th. The reasons why the claimant and his attorney of record and his said counsel could not have discovered said evidence before the trial, if due diligence had been used.

WHEN ARGUMENT TO BE ORDERED.—*Sec.* 6. If the court desires to hear argument upon a motion by a claimant for a new trial, the motion will be ordered to the law docket; otherwise decision will be announced from the bench without hearing.

ARTICLE XVIII.—APPEALS.

APPLICATION FOR APPEAL; HOW MADE.—*Sec.* 1. Application for appeal to the Supreme Court of the United States from any judgment or decree of this court must be in writing, and signed by the claimant or his attorney of record, if the appeal be on his behalf; or, if taken by the United States, it must be signed by the Attorney-General or his assistant.

TO BE FILED IN CLERK'S OFFICE, WHEN.—*Sec.* 2. Such application, if made when the court is not in session, must be filed with

the clerk, and the date of filing the same must be indorsed upon it and noted upon the general docket.

ARTICLE XIX.—CLERK'S OFFICE.

HOURS OF CLERK'S OFFICE.—*Sec.* 1. During term time the clerk's office must be kept open every day, except Sundays and holidays, from 9½ A. M. to 4 P. M., or to such later hour as the court may be in session or in conference. During the Christmas holidays, the office may be closed at 1 P. M., and in vacation at 3 P. M.

ATTENDANCE OF CLERKS.—*Sec.* 2. When the court is in session, both the chief clerk and the assistant clerk will be at the office during office hours. In vacation they may arrange their hours to suit each other and the public business.

DUTIES OF CHIEF CLERK.—*Sec.* 3. The chief clerk will have charge of the journal of the court, of the law and trial dockets, of the printing, and of the preparation of the tables of contents of the records of each case; and he will also prepare the annual return to Congress.

DUTIES OF ASSISTANT CLERK.—*Sec.* 4. The assistant clerk will attend to office business, and will have charge of the general docket, the notice book, and the giving of notices under these rules.

PROVISION FOR ABSENCE.—*Sec.* 5. In the absence of the chief or the assistant clerk, his duties will be temporarily performed by the other.

ARTICLE XX.—WITHDRAWAL OF PAPERS.

WITHDRAWAL OF PAPERS.—*Sec.* 1. Papers shall not be withdrawn from the files except on motion for good cause shown, and upon such terms as the court or a judge may order.

ARTICLE XXI.—EXTENSION OF TIME.

EXTENSION OF TIME.—*Sec.* 1. The time named in these rules for the doing of any act may be extended on motion for good cause shown.

Regulations prescribed by the Supreme Court of the United States under which appeals may be taken from the Court of Claims.

Rule 1.

Record on which appeals are heard in Supreme Court.—In all cases hereafter decided in the Court of Claims, in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:

Transcript of pleadings, etc.—1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments and decrees as may be necessary to a proper review of the case.

Finding of fact and conclusions of law.—2. A finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as part of the record.

Rule 2.

[Now obsolete.]

Rule 3.

Application for appeals stops limitation from running; to be allowed by the court or Chief Justice.—In all cases an order of allowance of appeal by the Court of Claims, or the Chief Justice thereof in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal.

Rule 4.

Findings of fact and conclusions of law to be filed by court.—In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of facts and their conclusions of law therein

in open court, before or at the time they enter judgment in the case.

Rule 5.

Parties before trial to submit request to find facts.—In every such case, each party, at such time before trial, and in such form, as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the finding of facts.

FORMS.

CAPTION AND TITLE OF SUIT AND JURISDICTIONAL CLAUSE IN SUITS AT LAW OR IN EQUITY.

Form No. 1.

Caption and title of cause.

Circuit [or district] court of the United States, for the district of . Of term in the year .

A. B.
v.
C. D.
} At law.
[Or in equity, or in admiralty.]

Form No. 2.

Jurisdictional clause in a suit by a citizen of the United States against an alien.

A. B., who is a citizen of the state of , sues [or complains of] C. D., who is a subject [or citizen] of , and an alien, for that, etc.

Form No. 3.

Jurisdictional clause in a suit by an alien against a citizen of the United States.

A. B., who is a subject of the king [or emperor] of , and an alien, sues [or complains of] C. D., who is a citizen of the state of , for that, etc.

Form No. 4.

Jurisdictional clause in a suit by a citizen of one state against a citizen of another.

A. B., who is a citizen of the state of , sues [or complains of] C. D., who is a citizen of the state of , for that, etc.

Form No. 5.

Jurisdictional clause in suits by a corporation.

The [giving the name of the corporation] citizen of the state of , and incorporated by the laws of said state, and having its principal place of business therein, sues [or complains of] C. D., a citizen of the state of , etc.

Form No. 6.

Jurisdictional clause in suits against a corporation.

A. B., a citizen of the state of , sues [or complains of] , a corporation, organized and constituted by that name, by the laws of the state of , and having their principal place of business in said state, defendant, for that, etc.

Form No. 7.

Commencement of declaration by the United States.

[Caption and title of cause as in Form No. 1.]

The United States by , their attorney for the district of , sue, etc.

Form No. 8.

Caption and title of a cause in the Supreme Court.

In the Supreme Court of the United States.

A. B., complainant,
v.
C. D., defendant,

} In equity.
[Or at law.]

FORM No. 9.

Jurisdictional clause in the Supreme Court in case of a controversy between states in reference to boundary.

[Caption and title of cause as in Form No. 8.]

The state of , by A. B., her agent and attorney, duly appointed and commissioned in pursuance of law, complains and states that a controversy has arisen between said state and the state of respecting the boundary between said states; and the said state of complains, etc.

FORMS OF DECLARATIONS.

FORM No. 10.

Declaration on common counts in assumpsit.

[Title of cause and jurisdictional clause as in No. 1 and No. 2, 3 or 4.]

For that the defendant is indebted to the plaintiff for goods sold and delivered by the plaintiff to the defendant, on the of , 18 . [Or for work and labor done and materials provided by the plaintiff for the defendant at his request; or for money lent by the plaintiff to the defendant; or for money paid by the plaintiff to the defendant at his request; or for money received by the defendant for the use of the plaintiff; or for money found due from the defendant to the plaintiff on accounts stated between them] and for which the defendant promised to pay the plaintiff the sum of $, but which he has wholly failed and neglected to do. Wherefore the plaintiff claims judgment against the defendant for the sum of $, besides costs.

FORM No. 11.

Declaration by the payee against the maker of a promissory note.

[Caption and title of cause as in No. 1, and jurisdictional clause as in No. 2, 3 or 4.]

For that whereas the said C. D., defendant, on the day of , 18 , made his certain note in writing, commonly called a promissory note, his own proper hand being thereto sub-

scribed, bearing date the day and year last aforesaid, and then and there delivered the said note to A. B., the plaintiff, by which said note the defendant then and there promised to pay to the plaintiff, or his order, 6 months after the date thereof, the sum of $, for value received.[1] Nevertheless the said defendant, not regarding his said promise and undertaking, hath not paid the said sum of money, or any part thereof, to the said plaintiff, although often requested so to do; but the said defendant to pay him the same hath hitherto wholly neglected and refused and still doth neglect and refuse to the plaintiff of , and therefore he brings suit, etc.

G. F., Attorney for plaintiff.

Form No. 12.

Declaration by an endorsee of a promissory note, against the maker.

[Caption, title and jurisdictional clause same as in last number.]

For that whereas the said C. D. on the day of , 18 , at , made his certain note in writing, commonly called a promissory note, his own proper hand being thereto subscribed, bearing date the day and year last aforesaid, and then and there delivered the said note to one E. F., and by which said note he, the said C. D., then and there promised to pay, one year after the date thereof, to the said E. F. or order, the sum of $ for value received; and the said E. F., to whom or whose order the payment of the said money, in the said note specified, was by the said note to be made, after the making of said note and before the payment of the said money in said note specified, to wit, on the day of , 18 , at , indorsed the said note, his own proper hand being to such indorsement subscribed, by which said indorsement he, the said E. F., then and there ordered and appointed the said sum of money in the said note specified to be paid to the said A. B., plaintiff, and then and there delivered the said note, so endorsed as aforesaid, to the said A. B.; by means whereof the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect thereof. Nevertheless, the said defendant, not regarding his said promise and undertaking,

[1] See next form.

hath not paid the said sum of money, or any part thereof, to the said plaintiff, although often requested so to do, but the said defendant to pay him the same hath hitherto wholly neglected and refused and still doth neglect and refuse, to the damage of the said plaintiff of $, and therefore he brings suit.

G. H., Attorney for plaintiff.

Form No. 13.

Declaration in debt for a penalty.

[Caption, title and jurisdictional clause as in last form.]

For that whereas, to wit, on the day of , 18 , and since the enactment and approval of an act of the Congress of the United States, entitled [give the title], the said defendant [here state the facts constituting the offence], contrary to the form of the statute of the United States aforesaid, whereby the said defendant forfeited and became liable to pay for the said offence, to the plaintiff, being the party aggrieved thereby, the sum of dollars penalty as aforesaid, and thereby, and by force of the statute aforesaid, a right of action hath accrued to the plaintiff to recover of and from the defendant the said sum of dollars so forfeited as aforesaid.

Form No. 14.

Declaration in debt by the United States for a penalty.

[Caption and title as in Forms No. 1 and No. 7.]

The United States of America, plaintiff, by G. F., their district attorney, complain of C. D., the defendant—

For that heretofore, to wit, on the day of , A. D. 18 , at , in the county of , in the district of , and within the jurisdiction of this court, the defendant made, executed and delivered to one his draft on the First National Bank of , a bank constituted under the laws of the United States, for the sum of five hundred dollars, payable on demand to the said or order, without having the same duly stamped, or having thereon an adhesive stamp for denoting the duty chargeable thereon by law, to wit, a stamp of two cents, or any stamp, contrary to and with intent to evade the provisions of the

statutes of the United States in such case made and provided. Whereby, and by virtue of section 3422 of the Revised Statutes of the United States, an action hath accrued to the United States, and the said defendant has forfeited and become liable to pay the sum of fifty dollars.

Wherefore the plaintiff demands judgment herein against the said for the sum of fifty dollars besides costs.

G. F., District Attorney for the district.

Form No. 15.

Declaration in debt, on a bond.

[Title as in Form No. 1, with jurisdictional clause.]

For that whereas the said defendants heretofore, to wit, on the day of , 18 , at the of , in the district aforesaid, by their certain bond and writing obligatory, bearing date the day and year last aforesaid, sealed with the seals of the said defendants, which said bond and writing obligatory the said plaintiff now brings here into court and shows to the said court, acknowledged themselves to be firmly bound unto the said plaintiff in the full and just sum of dollars, for the payment of which the said defendants bound themselves, their heirs, executors and administrators, jointly and severally, firmly by these presents.

The plaintiff further says that the said bond and writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting to the effect following, to wit, that [here set out the recitals of the bond] it is provided that [here set out the condition of the bond] then the said obligation to be void, otherwise to remain in full force and virtue, as by the said bond and writing obligatory will more fully appear.

And the said plaintiff, for assigning a breach of the condition of said bond and writing obligatory, in fact says that after the making of said bond and writing obligatory, to wit, on the day of , 18 , at aforesaid, the said defendants [here state the breach].

By means of which said several premises the said writing obligatory became forfeited, and the said plaintiff has sustained damages to a large amount, to wit, to the amount of dollars, and

thereby an action hath accrued to the said plaintiff to demand and have of and from said defendants the sum of dollars, wherefore he brings this suit, etc.

Form No. 16.

Declaration for damages for violating a patent right.

[Caption and title as in Form No. 1.]

For that whereas the said plaintiff was the original inventor of a certain new and useful improvement, in the letters patent hereinafter mentioned and fully described, the same being a certain improvement in a steam engine, and in the mode of propelling therewith either vessels on the water or carriages on the land, which was not known or used before his said invention, and which was not, at the time of his application for a patent, as hereinafter mentioned, in public use with his consent or allowance. And the said plaintiff being so as aforesaid the inventor thereof, and being also a citizen of the United States, on the eighth day of March, one thousand eight hundred and thirty-four, upon due application therefor, did obtain certain letters patent therefor, in due form of law, under the seal of the United States, signed by Andrew Jackson, then President, and countersigned by Louis McLane, then Secretary of State, bearing date the day and year aforesaid, whereby then was secured to him, the said plaintiff, his heirs, executors, administrators or assigns, for the term of fourteen years from and after the date of the said patent, the exclusive right and liberty of making, using and vending to others to be used the said improvement, as by the said letters patent in court to be produced will fully appear.

And the said plaintiff further says that the said defendant, well knowing the said several premises, but contriving and wrongfully and injuriously intending to injure the plaintiff, and deprive him of the profits, benefits and advantages which he might and otherwise would have derived and acquired from the making, using and vending of the said invention or improvement, after the making and issuing of the said letters patent, and within the term of fourteen years in said letters patent mentioned, to wit, on the first day of January, eighteen hundred and forty, and on divers other days and times between that time and the commencement of this suit, at the city of New York, and within the southern district of New York,

wrongfully and unjustly, without the leave or license and against the will of the plaintiff, made and sold divers, to wit, ten machines for propelling boats, in imitation of the said invention and improvement, or a part of the said invention or improvement, to the benefit, use and enjoyment whereof the said plaintiff was and is entitled as aforesaid, in violation and infringement of the said letters patent, and of the exclusive right and privilege to which the plaintiff was and is entitled as aforesaid, and contrary to the form of the statutes of the United States in such case made and provided.

And the said plaintiff further says that the said defendant, well knowing the said several premises, but further contriving and intending as aforesaid, after the obtaining of the said letters patent by the said plaintiff as aforesaid, and within the said term of fourteen years, to wit, on the said first day of January, eighteen hundred and forty, and at divers other times between that day and the commencement of this suit, within the southern district of New York aforesaid, wrongfully and unjustly, without the leave or license and against the will of the plaintiff, did make and sell divers, to wit, ten improved machines for propelling boats or vessels upon the water, constructed in a similar form and acting upon the same principle as the said machine or improvement, to the benefit, use and enjoyment whereof the said plaintiff was and is entitled by his said letters patent, as aforesaid, in violation and infringement of the exclusive right so secured to the said plaintiff by the said letters patent as aforesaid, and contrary to the form of the statute in such case made and provided.

And the said plaintiff further says that the said defendant, well knowing the said several premises, but contriving and intending as aforesaid, after the obtaining of the said letters patent by the said plaintiff as aforesaid, and within the said term of fourteen years, to wit, on the said first day of January, eighteen hundred and forty, and at divers other times between that day and the commencement of this suit, in the southern district of New York aforesaid, wrongfully and unjustly, and without the consent or allowance and against the will of the plaintiff, did imitate in part and make a certain addition to the invention or improvement, to the benefit, use and enjoyment whereof the plaintiff was and is entitled as aforesaid, in breach of the said letters patent, and in violation and infringement of the exclusive right and privilege so secured to the said

plaintiff as aforesaid, and contrary to the form of the statute in such case made and provided.

By means of the committing of which said several grievances by the said defendant as aforesaid, the said plaintiff is greatly injured, and has lost and been deprived of divers great gains and profits which he might and otherwise would have derived from the said invention and improvement in the said letters patent described and set forth, and in respect whereof he was and is entitled to such privilege as aforesaid, and was and is otherwise damnified to the damage of the said plaintiff of ten thousand dollars, and therefore, etc.

Form No. 17.

Declaration on the case.

[Caption and title as in Form No. 1, with proper jurisdictional clause.]

A. B., being a citizen of the United States of America, and a resident of , plaintiff in this suit, by G. F., his attorney, complains of C. D., defendant , of the said district, of a plea of trespass on the case. The plaintiff states that J. L. and L. H., of the town of , in the county of and state of , and in said district, before and at the time of the making of the letters patent, and of the committing of the grievances by the said C. D. as hereinafter mentioned, were the true, original and first inventors of a certain new and useful improvement in , which was not known nor used before such invention or discovery as aforesaid, and was not at the time of the plaintiff's application for letters patent therefor, as hereinafter mentioned, in public use or on sale, with the consent or allowance of said J. L. and L. H., *or either of them;* and that the said J. L. and L. H. being such original and first inventors, and being citizens of the United States, obtained for said invention letters patent of the United States in due form of law, under the seal of the Patent-Office, bearing date the . The plaintiff further states that the said letters patent, having been wholly assigned by the said J. L. and L. H. to him, and having been surrendered by him for being partially invalid on account of a defective specification, were cancelled and new letters ordered to issue to him on the amended specification. And the plaintiff did accordingly obtain new letters patent for such invention in due form of law,

upon such amended specification, under the seal of the Patent-Office, and signed by the Secretary of the Interior, and countersigned by the Commissioner of Patents, and bearing date the , eighteen hundred and , which said reissued letters patent did grant according to law, to the said A. B., his heirs, administrators and assigns, for the term of years from the said day of , eighteen hundred and , the full and exclusive right and liberty of making, constructing, using and vending to others to be used the said improvement, a description whereof was given in the said specification and in a certain schedule to said letters annexed and made part thereof, as by reference to said letters patent and the said specification thereto annexed, which the plaintiff now brings here into court, will fully appear.

And the plaintiff further says that from the time of the granting to him of the said letters patent hitherto, he has made, used and vended to others to be used the said improvement, to his great advantage and profit. Yet the said defendant, well knowing the premises, but contriving to injure the plaintiff, on the day of , eighteen hundred and , and at divers other times before and afterwards, during the said term of years mentioned in said letters patent, and before the commencement of this suit, at , in the county of and state of , unlawfully and wrongfully, and without the consent or allowance and against the will of the plaintiff, did use, and cause to be used, the said improvement, in violation and infringement of the exclusive right so secured to plaintiff by said letters patent as aforesaid, and contrary to the form of the statute of the United States in such case made and provided, whereby the plaintiff has been greatly injured and deprived of great profit and advantage, which he otherwise would have derived from said improvement, and has sustained actual damage to the amount of dollars; and by force of the statute aforesaid, an action hath accrued to him to recover the said actual damages, and such additional amount, not exceeding in the whole three times the amount of such actual damage, as the court may see fit to order and adjudge, besides costs. Yet the said defendant , though requested, hath never paid the same, or any part thereof, to the plaintiff, but has refused, and yet refuses so to do, and, therefore, the plaintiff brings this suit.

G. F., Attorney and of counsel for plaintiff.

FORMS OF PLEAS.

Form No. 18.

Plea and Special Notices.

[Title as in Form No. 1.]

And the said defendant C. D., by G. F. his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the supposed grievances above laid to his charge, or any or either or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, and of this the said defendant puts himself upon the country, and the said plaintiff doth the like, etc.

And it is suggested to the court, now here, that the defendant gives the following notices in writing of special matter to the plaintiff, thirty days before trial, under section 15 of the act of Congress passed July 4, 1836, entitled "An act to promote the progress of the useful arts, and to repeal all acts and parts of acts heretofore made for that purpose:"

First, Notice of Special Matter.—Take notice that the above named defendant will prove upon the trial of this cause, in bar of the said plaintiff's action, that the said J. L. and L. H., the assignors of the said plaintiff, were not the original or first inventors of [here describe the patent].

And the said defendant will further prove, upon such trial as aforesaid, that the same principle was known to and had been previously combined by and invented by O. P., who resides (or resided) at , in the state of , and that the same was known to and combined by said O. P. as early as , 1849.

And the said defendant will further prove, upon said trial as aforesaid, that what is claimed in said declaration and in said letters patent therein mentioned, and the specifications and drawings thereto attached, as the invention of said assignors of said plaintiff named in said declaration, was substantially and in principle known to R. S., of , in the state of .

And the said defendant will further prove, upon said trial as aforesaid, that the thing patented in and by the letters patent was not first invented by or known to said J. L. and L. H., but the same was publicly known and used prior to the time when it is alleged in this action the same was invented by them.

And the defendant will prove that Q. R., who resides at , possessed such prior knowledge of the said thing mentioned as aforesaid in said declaration.

And that the said thing was in public use and on sale anterior to the said supposed discovery or invention thereof by said J. L. and L. H.

2d. Please take notice that, on said trial of this cause, in addition to the notices already served upon you, the defendant will prove by J. S., of , and others, that they knew of the use of said thing, or substantially the same, as the alleged invention of said J. L. and L. H., and the same, or substantially the same, was used by F. L., prior to the alleged invention thereof.

That the same, or substantially the same, was previously invented and patented November 10, 18 , by G. M.

And the same was, previously to the time when it is claimed they invented or discovered the same, in public use with his consent and allowance, and upon sale with his consent and allowance, and subsequent to the time when it is claimed he invented or discovered the same.

H. J., Attorney for defendant.

Form No. 19.

Plea; general issue in assumpsit.

[Title of cause as in Form No. 1.]

The said C. D., by G. F. his attorney, comes and defends the wrong and injury when, etc.; and says that he did not undertake and promise in the manner and form as the said A. B. hath above thereof complained against him; and of this he puts himself upon the country, etc.

G. F., Attorney for defendant.

Form No. 20.

Plea; general issue nil debit.

[Title as in Form No. 1.]

And the said C. D., by G. F. his attorney, comes and defends the wrong and injury, when, etc., and says that he does not owe

the said sum of dollars or any part thereof, in the manner and form as the said A. B. hath above thereof complained against him, and of this he puts himself upon the country, etc.

G. F., Attorney for defendant.

Form No. 21.

In debt; non est factum.

[Title as in Form No. 1.]

And the said C. D., by G. F. his attorney, comes and defends the wrongs and injuries, when, etc., and says that the supposed writing obligatory [or indenture, or articles of agreement, as the case may be] is not his deed, etc., and of this he puts himself upon the country, etc.

G. F., Attorney for defendant.

Form No. 21*a*.

In debt; nil tiel record.

[Title as in Form No. 1.]

And the said C. D., by G. F. his attorney, comes and defends the wrong and injury, when, etc., and says, there is not any record of the said supposed recognizance [or, if the action be on a judgment, of the said supposed recovery] in the said declaration mentioned remaining in the court aforesaid, before the said justices [or judge] thereof, in the manner and form as the said A. B. hath above, in his said declaration, alleged, and this he, the said C. D., is ready to verify, wherefore he prays judgment, if the said A. B. ought to have or maintain his aforesaid action thereof against him the said C. D., etc.

G. F., Attorney for defendant.

Form No. 22.

In covenant.

[Title as in Form No. 1.]

And the said C. D., by G. F. his attorney, comes and defends the wrong and injury, when, etc., and says that the said indenture

[or "articles of agreement," or "deed-poll"] is not his deed; and of this he, the said C. D., puts himself upon the country, etc.

G. F., Attorney for defendant.

Form No. 23.

General issue in case of trover, or for the infringement or a patent-right or copyright.

[Title as in Form No. 1.]

And the said C. D., by G. F. his attorney, comes and defends the wrong and injury, when, etc., and says he is not guilty of the said supposed grievances above laid to his charge, in manner and form as the said A. B. hath above thereof complained against him; and of this the said C. D. puts himself upon the country, etc.

G. F., Attorney for defendant.

Form No. 24.

In trespass.

[Caption and title as in Form No. 1.]

And that the said C. D., by G. F. his attorney, comes and defends the force and injury, when, etc., and says that he is not guilty of the said supposed trespass above laid to his charge, or any part thereof, in manner and form as the said A. B. hath above thereof complained against him; and of this he puts himself upon the country.

G. F., Attorney for defendant.

FORMS IN EQUITY.

Form No. 25.

A bill to recover a legacy.

[Title of suit as in Form No. 1.]

In Equity.

To the judges of the circuit court of the United States for the district of Massachusetts.

I. W., a resident of the city of New York, and a citizen of the state of New York, an infant under the age of twenty years, by his father and next friend, T. W., a resident of the same city and a citizen of the same state, brings this his bill against E. W. and R. W., who are both residents of the city of Boston, and citizens of the state of Massachusetts.

And your orator says that one T. A., of the city of Boston, being seized and possessed of a considerable real and personal estate, did, on or about the fourth of March, 1820, duly make and publish his last will and testament in writing; and thereby, among other things, bequeathed and devised to your orator, I. W., the sum of eight hundred dollars, and appointed the above named E. W. and R. W. executors of his last will and testament; that the said testator departed this life on or about the twentieth of December, 1822; and soon after the death of the said testator, to wit, on the eighth day of January, 1823, the defendants E. W. and R. W. duly proved the said will in the probate court of the city of Boston, and took upon themselves the burden and execution thereof; and did, accordingly, possess themselves of the testator's real and personal estate, amounting to the sum of five thousand dollars and upwards.

And your orator further says that he has, by his father and next friend, T. W., applied to the defendants, at various times and since his said legacy became due and payable, to pay the same for your orator's benefit; but they have positively refused to pay or secure for your orator's benefit the aforesaid legacy or any part thereof, pretending and alleging that the estate of the said testator,

both real and personal, was insufficient to discharge his just debts, and that they have exhausted the whole of the estate which has come into their hands in paying such debts; whereas your orator charges that the estate of the testator was of the value of five thousand dollars, as hereinbefore stated, and that his debts were small and of even trifling value when estimated by that amount.

And your orator charges that the said defendants converted the property of their testator to their own use, without making any satisfaction to your orator for his legacy hereinbefore mentioned.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are respectively required to answer; that is to say—

1. Whether it is not a fact that the said T. A. did duly make and publish his last will and testament, and therein bequeath to your orator a legacy of eight hundred dollars?

2. Whether it is not a fact that the said T. A., in his last will and testament, appointed them, the said E. W. and R. W., to be executors of the same?

3. Whether it is not a fact that the said testator died without revoking said last will and testament, but in fact leaving the same in full force?

4. Whether it is not a fact that the said defendants, or one of them, proved the said will in the probate court of the city of Boston, in due form of law, and took upon themselves the execution thereof?

5. Whether it is not a fact that they have possessed themselves of the real and personal estate, goods, chattels and effects of the said T. A., deceased?

6. Whether it is not a fact that assets of said testator have come into their hands more than sufficient to discharge his just debts?

7. Whether it is not a fact that they, and each of them, have refused to pay the legacy bequeathed to your orator, and that it remains wholly unpaid?

Your orator prays that the said defendants may be compelled to render a full and perfect account of the estate, goods, chattels and

effects of the said T. A., deceased, the value thereof, the debts due by said deceased, and to whom they have been paid and are payable, the debts due to said testator, and which of them have been paid to the said executors, and all other matters and things concerning the condition of said real estate. And that this they may do upon their corporal oaths, to the best of their respective knowledge, information and belief.

Your orator further prays that the said defendants may be compelled to pay the legacy of eight hundred dollars bequeathed to your orator by the testator, and that the same may be placed at interest for the benefit of your orator until he attains the age of twenty-one years, and then paid over to him. And that in the meantime the interest thereof be paid to your orator's father, to be applied by him to the support and maintenance of your orator. And that your orator may have such further or other relief as the nature of this case may require.

And your orator further prays that your honors will grant unto your orator the writ of subpœna, issuing out of and under the seal of this court, to be directed to the said defendants, E. W. and R. W., commanding them and each of them by a certain day, and under a certain penalty therein named, to appear before your honors in the circuit court of , and then and there answer the premises, and abide the order and decree of the court.

G. F., Solicitor for complainant.

Form No. 26.[1]

Bill to restrain the infringement of copyrights.

In Equity.

To the judges of the circuit court of the United States for the district of Massachusetts.

The bill of complaint of C. F., F. G. W., L. T. and J. S., all of C., in the county of M., in said district, against B. M., N. C., G. P. L., and T. H. W. and C. W. U.,

Respectfully show: your orators C. F., F. G. W. and L. T., printers and publishers and co-partners, doing business under the name and style of F., W. & T., and J. S., gentlemen, all of C., in

[1] See Fulsom *v.* Marsh, 2 Story 100.

the county of M., in said district of Massachusetts, and all being citizens of the United States, of that the said J. S. is, and heretofore at the time of the infringement hereinafterwards mentioned was, proprietor of the copyright of a work of which the said J. S. is the author and compiler, entitled "The Writings of George Washington, being his Correspondence, Addresses, Messages and other papers, official and private, selected and published from the original manuscripts, with a Life of the Author, Notes and Illustrations, by J. S.," consisting of twelve volumes, of all which volumes respectively the copyright was taken out by J. S., previous to the publication thereof respectively, and secured according to law; the said J. S., at the time of taking out and securing said copyrights respectively, and still being a citizen of the United States, and the term of each and all of which has still more than eight years to run; and that said F., W. & T., before the infringement hereinafterwards complained of, had, by an agreement with said J. S., undertaken and become interested in and assumed a part of the risk and responsibility of the publication of said work, and have ever since continued, and still continue, to be thus interested; and that ever since the first publication of the several volumes of said work, the public have been supplied with copies of the same by said J. S. and the publishers of the same at reasonable prices; and that said J. S. and said F., W. & T. have incurred very large expenses upon said publication, and have been and are in receipt of large amounts, the proceeds of the sale of said work, to reimburse their expenses and remunerate their care and labor bestowed on the same. And your orators further show that they, your orators, being in the receipt of large sums, the proceeds of the sale of said work as aforesaid, under said copyrights, B. M., N. C. and T. H. W., all in B., in the county of S., in said district of Massachusetts, and G. P. L., of C., in the county of M., in the district of N. H., book-sellers, being co-partners under the name, style and firm of M., C., L. & W., and also C. W. U., of S., in the county of E., in said district of Massachusetts, clerk, all of them well knowing that said J. S. held such copyrights, and said F., W. & T. were interested in the said publication, and deliberately, after due notice, intending to infringe said copyrights at said B., on the fifth day of August, in the year of our Lord eighteen hundred and forty, and at divers times before and since the said fifth day of August, without the allowance and consent of your

orators, or either of them, published and exposed to sale and sold a work in two volumes, entitled "The Life of Washington," in the form of an autobiography, the narrative being, to a great extent, conducted by himself in extracts and selections, his own writings, with portraits and other engravings, consisting of pages in the whole, which they still continue to expose to sale, having had due notice, and well knowing that the same is a copy from, and an infringement and piracy of, said "Writings of George Washington, etc., with a Life of the Author," so published by your orators as aforesaid. And your orators aver that three hundred and eighty-eight pages of said piratical work are copied *verbatim et literatim* from the said work so edited and compiled by said J. S. as aforesaid, and so published by your orators as aforesaid, consisting of matter which was published originally by said J. S., under his said copyright, and which had never before been published or printed, and which he, the said J. S., and his assigns had the exclusive right and privilege to print, publish, sell and expose to sale; and that many other parts of said piratical work published by said parties complained of, besides said three hundred and eighty-eight pages, are infringements upon said J. S.'s said copyrights, whereby your orators have sustained great damage, detriment and injury. And your orators further show that said M., C., L. & W. and U. still continue and threaten hereafter to continue to print, publish and expose to sale and sell copies of the said piratical work, the protests, expostulations and warnings of your orators to them to the contrary notwithstanding. All such actions, doings and pretences are contrary to equity and good conscience, and tend to the injury of your orators in the premises. In consideration whereof, and forasmuch as your orators are remediless in the premises at law, and can have no adequate relief save in a court of equity, where matters of this and the like nature are properly cognizable and relievable; and to the end that said M., C., L. & W. and U. may appear and answer all and singular the matters and things hereinbefore set forth and complained of, particularly how many copies of said piratical work they have sold, what number they have on hand, and that they be restrained by injunction issuing from this court from selling or exposing to sale, or otherwise disposing of, any copies of said piratical work; and that they be ordered and decreed to render an account of the copies of the same

that they have sold, and to pay over the profits of such sales to the plaintiffs, and that they be ordered to surrender and deliver up the copies on hand and the stereotype plates of said piratical work to an officer of this court to be cancelled and destroyed, and be ordered to pay the plaintiffs their costs; and that your orators may obtain such other and further relief as to this honorable court may seem meet, or as equity may require,—may it please this honorable court to grant to your orators a writ of subpœna directed to the said M., C., L. & W. and U., commanding them at a day certain, and under a certain penalty to be therein inserted, personally to be and appear before this honorable court, then and there to answer the premises, and to stand and abide such order and decree therein as to this honorable court shall seem agreeable to equity and good conscience.

S. R., Solicitor for complainants.

Form No. 27.

Bill to restrain the infringement of a patent-right.

[Title as in Form No. 1; no jurisdiction clause required.]

In Equity.

To the judges of the circuit court of the United States for the district of Massachusetts.

E. H., Jr., of B., in the state of New York, and a citizen of the state of New York, brings this his bill against C. W., of B., in the state of Massachusetts, and a citizen of the state of Massachusetts.

And thereupon your orator complains and says that he, being the original and first inventor of a new and useful improvement in sewing-machines, fully described in the letters patent issued to him therefor as hereinafter stated, and not known or used by others before his invention thereof, and not at the time of his application for letters patent therefor in public use or on sale with his consent or allowance as the inventor; and being a citizen of the United States, and having made due application, and having fully and in all respects complied with all the requisitions of the law in that behalf, did obtain letters patent therefor, issued in due form of law to him in the name of the United States, and under the seal of the

Patent-Office of the United States, and signed by N. P. T., Acting Secretary of State, and countersigned by H. H. S., Acting Commissioner of Patents, bearing date the tenth day of September, in the year of our Lord eighteen hundred and forty-six, whereby was granted and secured according to law to your orator, his heirs, administrators or assigns, for the term of fourteen years from said date, the full and exclusive right and liberty of making, constructing, issuing and vending to others to be used the said improvement in sewing-machines therein specified and claimed, as in and by said letters patent, or a certified copy thereof, here in court to be produced, will more fully appear.

And your orator further shows unto your honors that certain assignments of certain rights in said patent have been made and duly recorded in the Patent-Office of the United States, whereby your orator, prior to the infringements herein complained of, became and now is the sole owner of said patent, as in and by said assignments, or certified copies thereof, here in court to be produced, will more fully appear.

And your orator further shows unto your honors that the said improvement in sewing-machines, granted to him as aforesaid, has hitherto been in the exclusive possession of your orator and of his grantees, and has hitherto been and still is of great value and profit to your orator; and that a license fee or patent rent, under his said patent, has hitherto been and still is paid to your orator for the largest portion of all the sewing-machines manufactured and sold in the United States; yet the said defendant, well knowing the premises, but contriving how to injure your orator, and without his consent and allowance, and without right, and in violation of said letters patent and your orator's exclusive rights secured to him aforesaid, has made, used or vended, and still does make, use or vend to others to be used in said district and in other parts of the United States, a large number of sewing-machines, but how many your orator cannot state, but prays that the defendant may discover and set forth each, embracing substantially the improvement in sewing-machines, or a material part thereof, patented to your orator as aforesaid, and thereby the said defendant has infringed, and still does infringe, and cause your orator to fear that in future he will infringe, upon the exclusive rights and privileges intended to be secured to your orator in and by his said letters patent.

And your orator further shows unto your honors that heretofore the validity of his said patent has been uniformly affirmed after severe and repeated contestation; namely, by a verdict and judgment thereon at law in 1852, and by six final decrees in equity in the circuit court of the United States for the district of Massachusetts, and by one final decree in equity in the circuit court of the United States for the southern district of New York, all obtained in favor of said patent prior to August, 1854.

And your orator further shows unto your honors that the sewing-machines made and sold by the defendant, as herein complained of, are in their essential parts and character substantially like the sewing-machines against which injunctions were obtained in the suits aforesaid, by your orator, or by your orator and his then co-owner of said patent.

And your orator has requested the said defendant to desist from making, using or vending to others to be used the said sewing-machines embracing the said improvements patented to your orator, and to account with and pay over to your orator the profits made by said defendant by reason of the unlawful making, using or vending of said sewing-machines embracing said patent improvement of your orator. But now, so it is, may it please your honors, that said defendant has combined and confederated with other persons, to your orator unknown, but whom, when discovered, your orator prays leave to make defendants hereto, to resist and destroy the exclusive rights and privileges secured to your orator as aforesaid, and to make, use and vend said improvement in sewing-machines, patented to your orator as aforesaid, without the license of your orator, and in violation of his just rights in the premises, all of which is contrary to equity and good conscience.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief herein prayed, and may under oath, and according to his best and utmost knowledge, remembrance, information or belief, full, true, direct and perfect answer make to all and singular the premises, and more especially may answer, discover and set forth whether during any and what period of time, and when, he has made, used and vended to others to be used, for any and what consideration, any and how many sewing-machines, and whether or not the same embraced the improvement in sewing-machines, or any substantial part thereof

patented to your orator as aforesaid, or how the same differed from your orator's said patent, if at all.

And that the said defendant may answer the premises, and may be decreed to account for and pay over to your orator all gains and profits realized from his unlawful making, using or vending of sewing-machines, embracing said improvement patented to and vested in your orator as aforesaid, and may be restrained by an injunction to be issued out of this honorable court, or by one of your honors, according to law in such case provided, from making, using or vending any sewing-machines embracing said improvement, or any substantial part thereof, patented to your orator as aforesaid, and that the infringing machines, now in the possession or under the control of the defendant, may be delivered up to your orator or be destroyed; and for such further and other relief in the premises as the nature of the case may require, and to your honors may seem meet.

May it please your honors to grant unto your orator, not only a writ or writs of injunction, conformable to the prayer of this bill, but also a writ or writs of subpœna to be directed to the said C. W. and confederates, when discovered, commanding him and them at a certain time, and under a certain penalty, therein to be limited, personally to be and appear before your honors to the honorable court, then and there to answer unto this bill of complaint, and to do and receive what to your honors may seem meet in the premises.

E. H., Jr.,
By G. F., his solicitor.

FORM No. 28.

Another form of bill to restrain an infringement of patent right, title having been established in previous suit, and for accounts, etc.

[Title of cause as in Form No. 1.]

In Equity.

To the judges of the circuit court of the United States for the district of Massachusetts.

C. G., of New Haven, in the state of Connecticut, and The Union India Rubber Company, a corporation duly established by the laws of the state of New York, and having their principal office and place of business in that state, bring this their bill of com-

plaint against The Beaverly Rubber Company, a corporation duly established by the laws of Massachusetts, and having their principal office and place of business in said state.

And thereupon your orators complain and say that before the fifteenth day of June, eighteen hundred and forty-four, the said C. G. became and was the first and original inventor of a certain "new and useful improvement in India-rubber fabrics," which your orators verily believe had not been known or used before his invention thereof, and which was not, at the time of his application for a patent therefor, in public use or on sale with his consent or allowance; and being such first and original inventor, and being desirous of obtaining an exclusive property in the invention by him made, the said C. G. made application in writing to the Commissioner of Patents, expressing such desire, and delivering a written description of his invention or discovery and a specification of improvement by him claimed; whereupon such proceedings were had that on the fifteenth day of June, eighteen hundred and forty-four, letters patent of the United States, entitled for "a new and useful improvement in India-rubber fabrics," signed by J. C. C., Secretary of State, and countersigned and sealed with the seal of the Patent-Office by H. L. E., Commissioner of Patents, were issued to your orator in due form of law, granting to your orator, C. G., his heirs, administrators or assigns, for the term of fourteen years from the day of the date thereof, the full and exclusive right and liberty of making, constructing, using and vending to others to be used the said improvement, a description whereof was annexed to to the said letters patent.

And your orators further show that afterwards the said C. G. surrendered the said last-mentioned letters patent to the Commissioner of Patents, in due form of law, and such proceedings were had that said Commissioner did, on the twenty-fifth day of December, eighteen hundred and forty-nine, reissue to said C. G. letters patent of the United States, entitled for a new and useful "improvement in processes for the manufacture of India rubber," signed by T. E., Secretary of State, and countersigned and sealed with the seal of the Patent-Office by T. E., Commissioner of Patents, whereupon there was granted to your orator, said C. G., his heirs, administrators and assigns, for the term of fourteen years from the fifteenth day of June, eighteen hundred and forty-four [being the date of the said

surrendered letters patent], the full and exclusive right and liberty of making, constructing and using, or vending to others to be used, the said improvement, a description whereof was annexed to said reissued letters patent, as by reference to the same, or to a true copy thereof hereunto annexed, and making a part of this your orator's bill of complaint, will more fully and at large appear.

And your orators further show that soon after the granting of the said letters patent, one H. H. D. commenced infringing the same, and that various suits were brought against him by your orator, C. G., at law and in equity.

A suit was also commenced by your orator, C. G., against E. S. and J. B. K., the agents of said H. H. D., for infringing said patent, in the circuit court of the United States for the district of Massachusetts, in the year 1845, and said H. H. D. and his said agents, E. S. and J. B. K., by their pleas, answers and notices, denied that your orator, C. G., was the first and original inventor of the improvement described and claimed in said patent of June 15, 1844, and also denied that the said patent was of any validity, for the reasons in said pleas, notices and answers set forth, upon which allegations the parties were at issue; that said suits were pending in said court till the fall of 1846, and for the trial of which preparations had been made on both sides.

And your orators further show that said suits were settled upon the application of said H. H. D., and a written agreement was executed between said H. H. D. and your orator C. G., whereby said H. H. D. agreed, among other things, to pay five thousand dollars for said settlement, and for a license to manufacture certain articles under said patent and other patents of your said orator, C. G., and to pay a tariff therefor, and covenanted not to infringe said patent, and said H. H. D. then and thereby acquiesced in your orator's (said C. G.'s) rights, and acknowledged the validity of said patents, and said sum of five thousand dollars was paid by said H. H. D. and said suits were discontinued, except the said suit against E. S. and J. B. K., agents of said H. H. D., in which a verdict was taken and a judgment entered up against them in favor of your orator, C. G., and satisfied as agreed between your orator (said C. G.) and said H. H. D., as by the record thereof now produced here in court will fully appear. And your orators further show that soon after said settlement and the discontinuance of said

suit, said H. H. D. recommenced his infringement of said patent; whereupon your orator, C. G., about the first day of November, eighteen hundred and fifty, filed his bill against the said H. H. D. in the circuit court of the United States for the district of New Jersey, setting out the said letters patent and the infringement thereof, praying an injunction and account against the said H. H. D.; to which bill of complaint the said H. H. D. filed his answer, denying the validity of the said letters patent, and setting up that some other persons than your orator, C. G., were the inventors of the things patented by him, and that the said reissue to your orator, C. G., had no title by reason thereof in his said invention; and issue being joined thereon, the parties proceeded to proofs, which were taken at great length and for a long time.

And your orators further show that, the proofs in said cause being taken, the cause was brought to final hearing on its merits at the March term of the circuit court of the United States for the district of New Jersey, in the year eighteen hundred and fifty-two, before justices G. and D., and by them held under advisement until the September term then next following, when the judgment of the court was pronounced, and opinions delivered, copies whereof are hereunto annexed.

And the said court then decided that both the said letters patent were valid in law, and that your orator C. G. was the inventor of the improvement patented, as aforesaid, by your orator C. G., and referred to in said bill of complaint; that the said reissued letters patent were lawfully reissued, and by a decree pronounced in said cause, perpetually enjoined the said H. H. D. from making, constructing, using, or vending to others to be used, the said improvements, and ordered an account to be taken of the damages due your orator C. G. by reason of the infringements of said H. H. D. already committed; as by reference to a true copy of the judgment of the court, or to the record of proceedings therein, ready to be produced, will more fully and at large appear.

And your orators further show that, from the granting of said letters patent until the hearing of the said cause against said H. H. D., said C. G. had and enjoyed an exclusive possession and use of the said improvements, by himself and his licensees, except so far as the same were disturbed by said H. H. D. and those combined and confederated with him, and by a few other persons who from

time to time began to violate his rights, but who uniformly acquiesced in them and submitted to pay tariffs for their future enjoyment when they became acquainted with your orator's (said C. G.'s) rights secured by his patent, so far as your orators have been informed and believe.

And your orators further show that the annexed schedule, marked A, is a correct copy of the original letters patent aforesaid; the annexed schedule, marked B, is a correct copy of the letters of reissue aforesaid; and the annexed schedule, marked C, contains true copies of the opinion delivered as aforesaid by the judges of the circuit court of the United States for the district of New Jersey.

And your orators further show that, on the fifteenth day of June, A. D. 1858, the Honorable J. H., Commissioner of Patents of the United States, did, as such commissioner, duly grant to said C. G. an extension of said letters patent of June 15, 1844, as reissued December 25, 1849, for the further term of seven years from the said fifteenth day of June, A. D. 1858, and that the certificate and award of such extension were, by the said commissioner, duly endorsed on the letters patent of which extension was so granted.

And your orators further show that, before the said extension, the said Union India Rubber Company held, under certain agreements, rights from said C. G., authorizing them to make various articles of India rubber according to his process, so as aforesaid patented, and giving them the exclusive right to make clothing according to that process. That on the twenty-third day of April, A. D. 1858, and afterwards, on the third day of July, A. D. 1858, said C. G., for a valuable consideration, executed and delivered to the said Union India Rubber Company certain agreements continuing such rights. That all the agreements aforesaid are in full force, and true copies of them are hereto annexed, those first mentioned being marked as Exhibit D, and the two last mentioned agreements being marked as Exhibit E.

And your orators further show that the said Union Rubber Company, before extension, were, and ever since have been, and now are, engaged under said agreement in the business of making and selling India-rubber goods of various kinds, including clothing, which are made under the aforesaid several agreements, according to said process of C. G., patented as aforesaid.

And your orators further show that, amongst all persons engaged in the manufacture of India rubber within the United States, the term or phrase "Vulcanized Rubber Goods" is used and is understood by the defendants and other persons in said business to mean the fabric or product made according to said C. G.'s process, patented as aforesaid, and is so used and understood as the designation of all goods made of a compound of India rubber in the original composition, whereof sulphur was present in any form or degree; such compound being in that state subjected to the action of artificial heat, so as to produce the chemical or other changes or effects described in said C. G.'s original and reissued letters patent, and the specifications thereto annexed. And your orators employ such phrase in this bill of complaint in the sense so explained.

And your orators further show that, as they have been informed and believe, the said defendants, not only before the extension of C. G.'s aforesaid patent, but also since that time, have been, and they now are, engaged, without the license or consent of said C. G. or your orators, in making and selling, or causing or procuring to be made and sold, various kinds of goods of vulcanized rubber, which goods are included in the aforesaid rights of your orators. That the said defendants, in the making of such goods, have, as your orators are informed and believe, used a compound of India rubber in which sulphur was present when the compound was subjected to the action of artificial heat, so as to produce the aforesaid changes and effects. But your orators are informed and believe that said defendants claim or pretend, as to the whole or some of such goods, that they do not subject the same to the particular degree of heat mentioned by C. G. in his aforesaid specifications, or that in some manner they avoid following exactly the process of manufacture so described by him. But your orators aver and charge that the said pretence is unfounded, and that the goods so made by said defendants, or the compounds of which they are made, have before the completion of the manufacture, at some time, been subjected to the treatment or process described by C. G. as aforesaid, or some treatment or process substantially or practically similar in its nature and the same in its effects.

And your orators further show that, as they are informed and believe, the said defendants threaten to continue making and selling or making or selling, or causing and procuring to be made and sold

or made or sold, such goods as are above described in this bill of complaint. And your orators say that they have been damaged and injured by such acts of the defendants, and apprehend being further injured in future by the repetition or continuance of such acts.

And your orators pray that said several papers heretofore referred to in this bill of complaint, and of which copies are annexed as aforesaid, may be taken as a part of such bill, your orators being prepared to prove the execution of the several agreements aforesaid and the issuing of said letters patent, and the giving of the opinion aforesaid in N. J., and being ready to produce all such documents and papers.

All which actions, doings and pretences are contrary to equity and good conscience, and tend to the manifest injury of your orators in the premises.

In consideration whereof, and forasmuch as your orators can only have adequate relief in this court, where matters of this kind are properly cognizable and relievable: To the end, therefore, that the said The Beaverly Rubber Company and their confederates, when discovered, may upon their respective and corporal oaths, and to the best and utmost of their respective knowledge, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were now repeated and they severally interrogated thereto, and more especially that they may set forth particularly —

First. Whether the said suit was not brought against the said H. H. D. at the time and manner specified therein; and whether it did not result as herein described.

Second. Whether said Beaverly Rubber Company has not made and sold, or caused and procured to be made and sold, clothing or other goods; and if so, what kind and amount of articles in the manufacture of which, at any time during the process of manufacture, or in the completion thereof, there was used or employed a compound of India rubber in which sulphur was present, to which compound, or the goods when made thereof, artificial heat was or had been applied, so as to produce in such compound or goods the effect of vulcanization.

Third. Whether the said defendants have made and sold, or caused or procured to be made and sold, any, and if so, what description or quantity of, goods of vulcanized rubber, or rubber compounded with

sulphur, and subjected to the action of artificial heat, according to the process described in the aforesaid letters patent of C. G., or the specifications attached thereto.

Fourth. Whether the said defendants have, since the said fifteenth day of June, A. D. 1858, made or sold, or caused or procured to be made or sold, any, and if so, what description and quantity of, goods made of and from a compound of India rubber, in which sulphur was present, which compound had at any time, or in any form, been subjected to artificial heat, so as to have become vulcanized within the meaning of that term as hereinbefore defined and used, or so as to become insensible to the action of heat or cold, or prevented from liability to decompose from the action of essential oils or animal perspiration. And that the defendants may answer the premises, and that they may be decreed to account with your orators for the quantity of articles which they have made in violation of the said letters patent or any of the rights of your orators, and to pay over to your orators such sum as may be proper as damages for such infringements; and that the defendants may be perpetually enjoined from any further violation of the rights of your orators, or of either of them; or that your orators may have such further and other relief in the premises as may be consistent with equity and good conscience.

May it please your honors, the premises considered, to grant unto your orators the writ of injunction issuing out of and under the seal of this honorable court, directed to the said Beaverly Rubber Company, commanding and strictly enjoining them, and each of them, not to manufacture, use or sell, or cause or procure to be manufactured, used or sold, any articles of vulcanized rubber, or any articles made of a compound of India rubber in which sulphur is present in any form or degree, such compound, or the fabric made therefrom, having been at any time subjected to the action of artificial heat so as to be changed or affected in the manner described in the aforesaid letters patent or specifications, or so as to have become insensible to heat or cold, or not liable to decompose from the action of essential oils or animal perspiration, and from taking or selling any article made from a compound which has been at any time so vulcanized, or affected or changed.

And also the writ of subpœna issuing out of and under the seal of this honorable court, directed to the said defendants, commanding them to be and appear at a certain day, and under a certain

penalty therein to be expressed before this honorable court, to answer the premises, and to stand to, perform and abide by such order, direction and decree, as to your honors shall seem meet. And your orators, etc.

E. M., by G. F., Solicitor for complainants.

Form No. 29.

Bill for an account and an injunction against the illegal use of a trade-mark.

[Caption and title as in Form No. 1.]

In Equity.

To the judges of the circuit court of the United States for the district of , in the circuit, sitting as a court of equity.

A. B. and C. D., of , and citizens of the state of , bring this their bill against E. F., of , and a citizen of the state of . And thereupon your orators, humbly complaining, show unto your honors that they are the assignees and successors in the business of L. & Co., a firm which was composed of and your orators, and which firm was formerly engaged in the manufacture and sale of sewing-machines in ; and for the period of more than five years, your orators and their predecessors had been engaged in the manufacture and sale of sewing-machines at the same place; and that during the whole period of time of such manufacture and sale by them, they had exclusively used, and your orators are now so using, and had and still have the right to so use, a certain trade-mark for said sewing-machines, which trade-mark was printed on paper of an ultramarine ground, in which is represented a view of the princess Penelope weaving, and the name "Penelope," which is the essential part of said mark, printed thereon; and that no person, firm or corporation, except the said and your orators, have had at any time heretofore, and none except your orators now have, any right to use the said trade-mark or any trade-mark essentially the same.

They further show to your honors that on the said day of , in the year , being entitled as aforesaid to the exclusive use of said trade-mark, and desiring to secure to themselves full and lawful protection for the same by due registration thereof in the United States Patent-Office, according to law,

your orators did deposit in the said Patent-Office of the United States for registration their trade-mark as aforesaid for sewing-machines; and having fully complied with all the requirements of the act of Congress in such cases made and provided, the trade-mark aforesaid was on the day of , in the year , duly and lawfully registered and recorded in the said United States Patent-Office, with protection to remain in force for thirty years from said date, all of which, with an accurate copy and description of said trade-mark and a declaration of a member of the firm by which it was registered, will more fully and at large appear from copies from the Patent-Office, duly certified by , Commissioner of Patents, under his seal of office, and herewith filed as a part of this bill, marked ; and thereupon protection in the exclusive use of the trade-mark aforesaid previously held and enjoyed by your orators was secured to them for the period of thirty years from said day of , in the year .

Your orators further respectfully show unto your honors that since your orators have had the exclusive right to use the said trade-mark, to wit, from the day of , in the year , to the present time, the said E. F., of , in the state of , has been manufacturing sewing-machines in the said city of , and has been unlawfully and without your orators' consent using, in the sale thereof, a trade-mark substantially like, and indeed almost identical with, that of your orators.

And your orators do further show that they hold and estimate their said trade-mark at the price and value of thousand dollars; but cannot with certainty state the exact amount of their loss and injury, suffered by reason of said wrongful acts of the defendant, but believe the same to be the full sum of thousand dollars, and do so charge the fact.

To the end, therefore, that your orators may obtain relief in the premises in this honorable court, where alone adequate relief can be afforded, they pray:

1st. That the said E. F. may be made a defendant to this bill, and compelled to answer each and every allegation thereof, on oath, as fully and to the same extent as if he were directly and particularly interrogated as to each allegation.

2d. That he may be compelled to render, before a commissioner of this court, a full, true and perfect account of all profits of every

description which he has made or might have made, by the use of the simulated trade-mark aforesaid, or by the use of any other trade-mark for sewing-machines having thereon as a constituent part thereof the word "Penelope," or a representation of the princess Penelope weaving, or any trade-mark having such near resemblance to that of your orators as aforesaid, as might be calculated to deceive; and that he, the said E. F., be also decreed to pay over to them all such profits.

3d. That the said commissioner be required to ascertain and report to this court, also, what loss and damage has been inflicted upon your orators by reason of the infringement of your orators' right, and the interference aforesaid with the right of the exclusive use of the trade-mark first above mentioned; and that the said E. F. be also decreed to pay them such damages.

4th. And may it please your honors to grant unto your orators a restraining order against the defendant, enjoining and restraining him, his clerks, attorneys, agents and servants, from using the simulated trade-mark aforesaid, or any other trade-mark containing the word "Penelope," or being substantially the same with that of your orators.

5th. And that your orators may obtain the relief prayed for, and all such further or other relief as the nature of their case may require, may it please your honors to grant to your orators the writ of subpœna against the said E. F., etc.

C. D.

G. and F., Solicitors for complainants.

UNITED STATES OF AMERICA, DISTRICT OF . } *ss:*

At the city of , in the county of , and district aforesaid, this day of , in the year , personally appeared before me, , U. S. commissioner for said district, the above named C. D., and made oath that, the facts set forth in the foregoing bill, so far as they purport to be stated as of his own knowledge, are true; and so far as they purport to be stated on information and belief, he believes them to be true.

Given under my hand this day of , in the year .

T. J., U. S. Commissioner for district of .

Form No. 30.

Bill for a discovery and to enjoin.

[Title as in Form No. 1.]

In Equity.

To the honorable the judges of the circuit court of the United States for the circuit, within and for the district of .

A. B., a citizen of the state of [or a corporation duly established under the laws of the state of], brings this his bill of complaint against C. D., a citizen of , in said district.

And thereupon your orator complains and says: That he is a citizen of the United States, was the true and original inventor of a new and useful improvement in , which said improvement was not known or used by others before the invention and discovery thereof by him, who thereupon did apply to the Commissioner of Patents of the United States for letters patent for said improvement, and fully and in all respects complied with all the requirements of the law in that behalf, and especially made oath that he verily believed himself to be the true inventor or discoverer of the said improvement, and also paid into the treasury of the United States the sum of thirty dollars, and presented to the Commissioner of Patents of the United States a petition setting forth his desire to obtain an exclusive property in said improvement, and praying that letters patent might for that purpose be granted unto him; and also delivered and filed in said office of the Commissioner of Patents a written description of his said improvement, in such full, clear and exact terms as to enable any person skilled in the art with which the said improvement is most nearly connected, to make and use the same; which said description was duly signed by him, the said A. B., and attested by two witnesses; and thereupon the said Commissioner of Patents caused letters patent to be made out and issued in the name of the United States of America, in due form of law in all respects, bearing date the day of , in the year one thousand eight hundred and , whereby was granted unto the said A. B., his heirs, administrators or assigns, for the term of years from the date thereof,

the full and exclusive right and liberty of making, constructing, using and vending to others to be used the said improvement, which is entitled in said letters patent, "A new and useful improvement in ;" and the said letters patent having been signed by , Secretary of the Interior of the United States, and countersigned and sealed with the seal of the Patent-Office by , Commissioner of Patents of the United States, and the same having been duly recorded, were issued and delivered unto the said A. B.

And your orator further shows unto your honors that the defendant, C. D., since the day of , has been engaged in making, using and selling a large amount of , such as is described in said patents, and that the defendant refused to pay to your orator any of the profits which he made by such unlawful manufacture, use and sales, or to desist from making, using and selling the same in violation and infringement of your orator's rights, secured to them as aforesaid, and without their consent or allowance.

All of which actings and doings are contrary to equity and good conscience, and tend to the manifest injury of your orator in the premises.

In consideration whereof, and forasmuch as your orator can only have adequate relief in this honorable court, where matters and things of this kind are made cognizable by statute: To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby prayed, and may, upon his corporal oath and according to his best and utmost knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters and things hereinbefore stated and charged, and to the several interrogatories hereinafter numbered as set forth by the note hereunder written, he is required to answer; that is to say:

1. Whether he has not been engaged in selling the described in said patent.

2. Whether he has not derived a large profit thereon, and if so, how much.

And that the said defendant may answer the premises, and that he may be decreed to account with and pay over to your orator the profits which he has or might have made by said infringement

of said letters patent in such unlawful manufacture, use and sale of :

May it please your honors, the premises considered, to grant unto your orator a writ of injunction, issuing out of and under the seal of this honorable court (or issued by one of your honors according to the form of the statute in such case made and provided), enjoining and restraining the said C. D., his clerks, attorneys, agents, servants and workmen, from making any as is described in such his letters patent.

And that your orators may have such further and other relief as the nature of the case may require, and to your honors seem meet.

May it please your honors to grant unto your orator, not only the writ of injunction conformable to the prayer of this bill, but also a writ of subpœna directed to the said C. D., commanding him on a day certain, therein to be named, to be and appear in this honorable court; then and there to answer the premises, and to stand to, perform and abide such further order, direction and decree as may be made against .

And your orator, as in duty bound, will ever pray, etc.

A. B., Complainant.

G. F., Solicitor and counsel for complainant.

UNITED STATES OF AMERICA, DISTRICT OF . } *ss:*

At , in the county of , and district aforesaid, on this day of , A. D. 18 , personally appeared the above named A. B., who being duly sworn according to law, deposeth and saith that he is the complainant in the foregoing bill, and has read the same, and knows the contents thereof; that the said bill is true of his own knowledge, except as to those matters which are therein stated to be on information and belief of the complainant, and as to those matters he believes it to be true; and that this deponent verily believes he was the first and original inventor of the improvements claimed in said letters patent.

A. B.

T. J., U. S. Commissioner for the district of .

CIRCUIT COURT FORMS IN EQUITY.

Form No. 31.

Order for subpœna.

At a term of the circuit court of the United States of America for the district of , in the second circuit, held at the on the day of in the year of our Lord one thousand eight hundred and .

Present:—The honorable (justice or judge).

A. B.
v. } In equity.
C. D.

On filing bill of complaint in this cause, and on motion of , complainant's solicitor: Ordered, that a writ of subpœna do issue out of and under the seal of this court, pursuant to the prayer of said bill, and that this cause be docketed for complainant.

Form No. 32.

Subpœna to appear and answer and return.

[Title of cause.]

The President of the United States of America, to C. D., *Greeting:*

You are hereby commanded that you personally appear before the judges of the circuit court of the United States for the district of , in the second circuit, on the , to answer a bill of complaint [L. S.] exhibited against you in the said court by A. B., and to do further and receive whatever said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the honorable Chief Justice of the Supreme Court of the United States, at the city of in said district, the day of eighteen hundred and

Clerk.

G. F., Solicitor for plaintiff.

MEMORANDUM.—The defendant is to enter his appearance in the suit above mentioned, in the clerk's office at , on or before the day at which the above subpœna is returnable, otherwise the bill may be taken *pro confesso*.

G. F., Solicitor for plaintiff.

MARSHAL'S RETURN.—I hereby certify that I served the within subpœna on at on the day of , A. D. 18 , and on at on the day of , A. D. 18 , by delivering to and leaving with them, and each of them, a copy of this subpœna, and at the same time showing them, and each of them, this original, with the seal of the court attached.

, Deputy.

FORM OF APPOINTMENT TO SERVE SUBPŒNA.

DISTRICT OF NEW YORK:

I hereby authorize and depute G. H. to execute the annexed process, and make due return according to law.

E. F., United States marshal, district of .

FORM NO. 33.

Precipe for appearance.

United States circuit court, district of

A. B.
v.
C. D. } In equity.

The clerk of this court will please enter my appearance as solicitor for the defendant in the above entitled case.

Yours, etc.,

, Solicitor for defendant.

Dated, , 18 .

FORM NO. 34.

Order for appearance.

United States circuit court, district of .

A. B.
v. } In equity.
C. D.

On filing precipe in this cause and on motion of , ordered that his appearance as solicitor for the defendant herein be and the same hereby is entered, and that this cause be now docketed for said defendant.

FORM NO. 35.

Motion for leave to file supplemental bill.

United States circuit court, district of .

A. B.
v. } In equity.
C. D.

The complainants in the above entitled cause move the court, upon the proposed supplemental bill of complaint herewith filed, for leave to file the same as a supplemental bill of complaint in said cause, and that the same stand filed therein as of the rule-day for the first Monday of , A. D. 18 (motion to be heard on said rule-day before his honor , at o'clock).

G. F., Solicitor for complainant.

Dated, .

FORM NO. 36.

Answer; common form.

United States circuit court, district of .

A. B.
v. } In equity.
C. D.

The answer of to the bill of complaint of , complainant.

The defendant, now and at all times hereafter saving and reserving to himself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for him to make answer unto, answers and says: [here state the matters of defence.]

All of which matters and things the said defendant is ready to aver, maintain and prove, as this honorable court shall direct, and hereby prays to be hence dismissed with his reasonable costs and charges in that behalf sustained.

, Solicitor and of counsel.

DISTRICT OF , }
COUNTY OF . } *ss:*

C. D., being duly sworn, says that he is the defendant in the above-entitled cause, that he has *read* the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

Sworn to before me this day of , A. D. 18 .

FORM NO. 37.

Order on exceptions.

United States circuit court, district of .

A. B. }
v. } In equity.
C. D. }

Exceptions for insufficiency having been filed to the answer of the said on the day of , 18 , and the said not having submitted to answer said exceptions, on motion of , solicitor for complainant, it is ordered that said exceptions be set down for a hearing on the next rule-day, viz., the first Monday of , A. D. 18 , before , judge, at the , in the city of , at o'clock.

Form No. 38.

Supplemental bill in a patent cause, stating the fact of an extension since the filing of the original bill.

[Title as in Form No. 1.]

In Equity.

To the judges of the circuit court of the United States for the district of Massachusetts.

E. H., Jr., of B., in the state of N. Y., and a citizen of the state of N. Y., brings his supplemental bill against C. W. W., a citizen of the state of Massachusetts.

And thereupon your orator complains and says that he filed his original bill against the defendant in this court, August 9, 1859, wherein he prayed for a discovery, account, payment of profits and an injunction to restrain the said defendants from infringing on your orator's patent, granted to him by the United States of America, for improvement in sewing-machines, dated September 10, 1846; and for other relief, as stated in his said original bill.

And your orator further shows that since the filing of his said original bill, namely, on the eighth day of September, in the year eighteen hundred and sixty, upon the application of your orator, and after due proceedings had in all respects as required by law, the Commissioner of Patents granted the extension of said patent for the term of seven years from and after the expiration of the first term thereof, viz., the tenth day of September, 1860, and made a certificate of such extension thereon, and entered the same on record in the Patent-Office in due form of law; and thereupon the said patent was renewed and extended, and now has the same effect in law as though it had been originally granted for the term of twenty-one years, as in and by said certificate, or a certified copy thereof here in court to be produced, will more fully appear. Yet the said defendant, well knowing the premises, but contriving how to injure your orator, and without his consent or allowance, and without right and in violation of said letters patent and your orator's exclusive rights, secured to him as aforesaid from September 1, 1857, has made, used or vended, and still does make, use or vend

to others to be used in said district and in other parts of the United States, a large number of sewing-machines (but how many your orator cannot state, but prays that the defendant may discover and set forth), each embracing substantially the improvement in sewing-machines, or a material part thereof, patented by your orator as aforesaid; and thereby the said defendant has infringed, and still does infringe and cause your orator to fear that in future he will infringe, upon the exclusive rights and privileges intended to be secured to your orator in and by said letters patent.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief herein and in his said original bill prayed; and may, under oath and according to his best and utmost knowledge, remembrance, information or belief, full, true, direct and perfect answers make to all and singular the premises, and more fully may answer, discover and set forth whether, during any and what period of time since September 1, 1857, and where, he has made, used or vended to others to be used, for any and what consideration, any and how many sewing-machines; and whether or not the same embraced the said improvement in sewing-machines, or any substantial part thereof, patented to your orator as aforesaid, or how the same differed from your orator's said patent, if at all.

And that the said defendant may answer the premises, and may be decreed to account for and pay over to your orator all gains and profits realized from his unlawful making, using or vending of sewing-machines embracing said improvement patented to and vested in your orator as aforesaid; and may be restrained, by an injunction to be issued out of this honorable court; or by one of your honors, according to law in such case provided, from making, using or vending any sewing-machines embracing said improvement, or any substantial part thereof, patented to your orator as aforesaid, and that the infringing machines now in possession or under the control of the defendant may be delivered up to your orator or be destroyed; and for such further and other relief in the premises as the nature of the case may require, and to your honors may seem meet.

May it please your honors, etc.

E. H., Jr.

G. F., Solicitor for plaintiff.

Form No. 39.

Bill for a specific performance—short form.

[Caption and title as in No. 1, jurisdictional clause as in No. 7.]

Your orator, A. B., humbly complaining, alleges and shows:

1. That on the day of , 18 , the defendant, C. D., was seized in fee simple of real property described as follows [here describe the property].

2. That on the same day your orator and the said defendant entered into an agreement in writing under their hands and seals, whereby your orator agreed to purchase and the defendant to sell and convey the real estate and property aforesaid, which agreement is hereto annexed and made part of this bill, and marked "Exhibit A."

3. That on the day of , 18 , your orator tendered to the defendant the amount of the purchase money, as provided by the terms of said agreement, to wit $, and demanded a deed of conveyance of said property as provided by the said agreement; but the said defendant refused to convey the same to your orator, and still neglects and refuses to convey the same, as required by the provisions of said agreement, although your orator is still ready and willing to pay the said purchase money, and at all times has been since the tender aforesaid.

In consideration whereof, and inasmuch as your orator can have adequate relief only in this court, and to the end that the said defendant may, if he can, show why your orator should not have the relief herein prayed, and may upon his corporal oath, and according to the best and utmost of his ability, remembrance, information and belief, full, true, direct and perfect answer make to the matters and things hereinbefore stated, and more especially answer the several interrogatories hereinafter numbered; that is to say:

1. Whether he was not seized in fee simple of the real property described in paragraph one of this bill, at the time mentioned therein.

2. Whether he did not execute the agreement referred to in the second paragraph of this bill.

3. Whether your orator did not tender to him $, at the time mentioned in the third paragraph of this bill, and at the same

time demand a deed of conveyance of the land described in this bill.

4. Whether he did not, at time of said tender as aforesaid, refuse to convey the aforesaid real property to your orator.

5. Whether he has ever conveyed said real property to your orator.

6. Whether he still hold the title in fee simple to said real property.

Your orator prays that the defendant may be compelled to answer each and every allegation in this bill, and the interrogatories annexed thereto; that this honorable court may grant unto your orator a restraining order or injunction against the defendant, restraining him from conveying or incumbering said real property or any part thereof until the further order of the court; that your orator may have the writ of subpœna against the said defendant, and a decree against him that he execute a good and sufficient conveyance of said real estate to your orator.

A. B., by F. G. his solicitor.

[Sworn to in the usual manner.]

Form No. 40.

Second supplemental bill in a patent cause, stating that since the filing the first supplemental bill the patent had been surrendered, etc., and a new patent issued.

[Title of cause as in Form No. 1.]

In Equity.

To the judges of the circuit court of the United States for the district of Massachusetts.

E. H., Jr., of B., in the state of N. Y., and a citizen of the state of N. Y., brings this his second supplemental bill against C. W. W., of B., in the district of Massachusetts, sewing-machine maker, and a citizen of the state of Massachusetts.

And thereupon your orator complains and says that he filed his original bill against the said defendant in this court, August 9,

1859, and his first supplemental bill November 5, 1860; wherein he prayed for a discovery, account, payment of profits, and an injunction to restrain the said defendant from infringing your orator's patent, granted to him by the United States of America, for improvement in sewing-machines, dated September 10, 1846; and for other relief as stated in his original and supplemental bill.

And your orator further shows that since the filing of his said original bill, namely on the eighth day of September, in the year eighteen hundred and sixty, upon the application of your orator, and after due proceedings had in all respects as required by law, the Commissioner of Patents granted the extension of said patent for the term of seven years from and after the expiration of the first term, viz., the tenth day of September, 1860, and made a certificate of such extension thereon, and entered the same on the record in the Patent-Office in due form of law, and thereupon the said patent was renewed and extended, and now has the same effect in law as though it had been originally granted for the term of twenty-one years, as in and by said certificate or certified copy thereof, here in court to be produced, will more fully appear, and thereupon his first supplemental bill is filed as aforesaid.

And your orator further shows that since the filing of his first supplemental bill, namely, on the nineteenth day of March, in the year eighteen hundred and sixty-one, his aforesaid patent having been amended and cancelled on account of a defective specification, a new patent was duly issued to him for the same invention, in accordance with his corrected description and specification, whereby was granted and secured to your orator, his heirs, administrators or assigns, for said term of twenty-one years from September 10, 1846, the full and exclusive right and liberty of making, constructing, using or vending to others to be used the said improvement in sewing-machines therein specified and claimed, as in and by said reissued letters patent, or a certified copy thereof, here in court to be produced, will more fully appear.

And your orator further shows that since the extension of the said patent, he has himself become a manufacturer of sewing-machines, and has licensed many other parties to manufacture and sell sewing-machines, embracing his said patented invention; and that your orator and his licensees have made very large investments for the purpose of fully supplying the market with the best sewing-ma-

chines, and that the continued infringement of your orator's said patent, committed by the defendant, has caused and is still causing irreparable injury to your orator's said rights and business, and to the investments and business of your orator's licensees under his said patent; yet the said defendant, well knowing the premises, but contriving how to injure your orator, and without his consent or allowance, and without right, and in violation of said letters patent, and your orator's exclusive rights secured to him as aforesaid, has continued since the reissue aforesaid, as well as up to that time, to make and vend, and still does make and vend to others to be used in said district, and in other parts of the United States, a large number of sewing-machines, but how many your orator cannot state, but prays that the defendant may discover and set forth each, embracing substantially the improvement in sewing-machines, or a material part thereof, patented to your orator as aforesaid, and thereby the said defendant has infringed, and still does infringe, and cause your orator to fear that in future he will infringe, upon the exclusive rights and privileges intended to be secured to your orator by his said letters patent.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief herein and in his said original bill prayed, and may, under oath, and according to his best and utmost knowledge, remembrance, information or belief, full, true, direct and perfect answer make to all and singular the premises, and more especially may answer, discover and set forth whether during any and what period of time, since September 1, 1857, and where, he has made any and how many sewing-machines, and whether or not the same embraced the said improvement in sewing-machines, or any substantial part thereof, patented to your orator aforesaid, or how the same differed from your orator's said patent, if at all.

And that the said defendant may answer the premises, and may be decreed to account for and pay over to your orator all gains and profits realized from his unlawful making, using or vending of sewing-machines embracing said improvement patented to and vested in your orator as aforesaid; and may be restrained by an injunction to be issued out of this honorable court, or by one of your honors, according to law in such case provided, from making, using or vending any sewing-machines embracing said improve-

ment, or any substantial part thereof, patented to your orator as aforesaid, and that the infringing machines now in the possession or under control of the defendant may be delivered up to your orator or destroyed; and for such further and other relief in the premises as the nature of the case may require, and to your honors may seem meet.

May it please your honors, etc. E. H., Jr.

B. R. C., of counsel for plaintiff.

Form No. 41.

Amendment to a bill.

[Title of cause as in Form No. 1.]

In Equity.

Amendment to a bill of complaint in this cause, made pursuant to an order of the court, entered on the day of , A. D. 18 .

First. In the third line of the second folio of the bill, after the word "and," interline, "to wit, on or about the first day of January, A. D. 1870."

Second. After the word "time," in the tenth line of the sixth folio, insert the words following:

[Here insert the additional matter proposed.]

Third. Strike out the words "did convey," in the fourth line of the eleventh folio, and insert in lieu thereof the following: "was about to convey."

Fourth. Add the name of "E. F., of, etc." as a defendant in the second line of the fourteenth folio, after the word "and."[1]

G. F., Solicitor for complainant.

[1] An amended bill should state no more of the original bill than is necessary to introduce and make intelligible the new matter; nor should such amendment be incorporated in the old bill, but be by separate bill. And amendments should not be made by interlineations and erasures in the original bill, but by filing the same on a separate paper. The practice of amending pleadings by erasures and interlineations ought not to be tolerated by the courts. A paper thus disfigured will be stricken from the files.

FORM NO. 42.

General demurrer to bill.

[Title as in Form No. 1.]

In Equity.

The demurrer of C. D., defendant, to the bill of complaint of A. B., the above-named defendant [or, the joint and several demurrer of A. B. and C. D., the above-named defendants, to the, etc.]

This defendant, by protestation, not confessing any or all of the matters and things in the plaintiff's bill of complaint contained to be true, in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth that, etc.

[Here set forth the cause of the demurrer.]

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto, and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

G. F., Counsel for defendant.

FORM NO. 43.

Demurrer for want of equity.

[Title and caption as in Form No. 1, and commencement as in the last form.]

That the plaintiff hath not in and for his said bill made or stated such a case as entitles him in a court of equity to any discovery from this defendant [or, these defendants, or either of them], or to any relief against him [or, them or either of them] as to the matters contained in the said bill or any of such matters. Wherefore, etc.

[*Or thus.*] That the said bill doth not contain any matter of equity whereon this court can ground any decree, or give to the plaintiff any relief against this defendant [or, these defendants, or either of them].

FORM No. 44.

Another form of demurrer.

[Title and commencement as in Form No. 42.]

The said C. D. says that the plaintiff is not entitled upon said bill to the relief he prays for, because he had a plain and adequate remedy at law, and because, etc.

C. D., by F. R., his solicitor.

FORM No. 45.

Demurrer for Multifariousness.

[Title as in Form No. 1.]

In Equity.

The demurrer of, etc.

This defendant by protestation, etc., doth demur, and for cause of demurrer showeth that it appears by the said bill that the same is exhibited against this defendant and the several other persons therein named as defendants thereto, for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested or concerned, and that the said bill is altogether multifarious. Wherefore, etc.

FORM No. 46.

Demurrer on the ground of the Statute of Frauds.

[Title and commencement as in Form No. 42.]

That it appears by the said bill that neither the promise or the contract which is alleged by the said bill, and of which the plaintiff by the said bill seeks to have the benefit, nor any memorandum or note thereof, was ever reduced into writing or signed by this defendant [or, these defendants or either of them], or any person authorized thereunto, within the meaning of the statute [here designate the statute] for the prevention of frauds and perjuries. Wherefore, etc.

CERTIFICATE OF COUNSEL.

I hereby certify that I am solicitor and of counsel for the defendant in the above-entitled cause, and that in my opinion the foregoing demurrer of C. D., defendant to the bill of complaint of A. B., complainant, is well founded in point of law and proper to be filed in the above cause.

G. F., Solicitor and of counsel for defendant.

VERIFICATION BY DEFENDANT.

UNITED STATES OF AMERICA,
DISTRICT OF . } ss:

C. D., being duly sworn, deposes and says that the foregoing demurrer is not interposed to delay the cause or any proceedings therein.

C. D.

Subscribed and sworn to, etc.
J. K., Commissioner.

FORM NO. 47.

Plea; Certificate; Verification.

[Caption and title as in No. 1.]

The plea of C. D., defendant to the bill of complaint. A. B., complainant.

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's bill mentioned to be true in such manner and form as the same are therein and thereby set forth and alleged, doth plead thereto, and for plea says that the court ought not to take cognizance of or sustain the aforesaid action, because the plaintiff was at the time of the commencement of said suit a citizen of the state of [naming the state], and the defendant at the time of the commencement of said suit was a citizen of the same state of [here name the state], and he pleads these facts to the whole of said bill, and demands judgment of this honorable court whether he ought to be compelled to make any answer to the said bill of complaint; and prays that he be

hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

G. F., Solicitor and of counsel for defendant.

CERTIFICATE OF COUNSEL.

I hereby certify that I am solicitor and of counsel for the defendant in the foregoing cause, and that in my opinion the foregoing plea is well founded in point of law.

G. F., Solicitor and of counsel for defendant.

VERIFICATION BY THE DEFENDANT.

UNITED STATES OF AMERICA, }
DISTRICT OF . } *ss:*

C. D., being duly sworn, deposes and says that he is the defendant named in the foregoing plea; that he has read the same [or heard the same read], and knows the contents thereof, and that the same is true of his own knowledge.

C. D.

Subscribed and sworn to before me this day of , 18 .
J. K., Commissioner.

VERIFICATION BY DEFENDANT CORPORATION.

UNITED STATES OF AMERICA, }
DISTRICT OF . } *ss:* .

I, E. F., being duly sworn, depose and say that I am the president [or other officer, naming the same] of the [naming the corporation], defendant in the above cause; that I have read the foregoing plea, and know the contents thereof, and the same is true, as I verily believe.

E. F.

[Subscribed and sworn to as above.]

The certificate of counsel in such a case would be the same as in other cases. See above.

Form No. 48.

General frame of an answer to a bill.

[Title as in Form No. 1.]

In Equity.

The answer of C. D., defendant to the bill of complaint of A. B., cómplainant.

This defendant, now and all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for him to make answer unto, answering, says, etc. This defendant admits, etc.

This defendant, further answering, denies, etc. [and so on through the whole bill, admit or deny every material allegation, and set up any matter in defence or avoidance, as the nature of the case may require, and conclude as follows:]

And the defendant denies all and all manner of unlawful combination and confederacy, wherewith he is by the said bill charged, without this, that any other matter, cause or thing in the complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct; and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

G. F., Solicitor for defendant.

FORM NO. 49.

Exceptions to answer for insufficiency.

In the court of the United States for the district of , term, 18 .

A. B.
v. } In chancery.
C. D.

Exceptions taken by the complainant to the insufficient answer of the defendant, C. D., to the complainant's bill of complaint.

First. For that the defendant, C. D., has not, to the best and utmost of his knowledge, remembrance, information and belief, answered and set forth whether, etc. [Here set out the ground of exception.]

Second. For that the defendant has not, in manner aforesaid, answered and set forth whether, etc. [and so on, set out the grounds of each exception as the case may require, using the words of the interrogatory or matter not answered.]

In all which particulars the complainant excepts to the answer of the defendant C. D., as evasive, imperfect and insufficient, and prays that the defendant C. D. may be compelled to put in a full and sufficient answer thereto.

G. F., Solicitor for complainant.

FORM NO. 50.

Plea to part and answer to the residue of bill.

[Title as in Form No. 1.]

In Equity.

The plea of , defendant, to part, and his answer to the residue of the bill of complaint of , complainant.

This defendant, to all the relief sought by the said bill, and also to all the discovery thereby sought, except the discovery sought by or in respect of so much of the said bill as prays that this defendant may answer and set forth whether, etc. [here the language of the interrogatories which it is necessary to answer must be introduced], this defendant does plead in bar, and for plea says, etc. [Here set out the plea.]

All of which matters and things this defendant does aver to be true, and does plead the same in bar to the whole of the said bill, except such part of the discovery thereby sought as aforesaid; and this defendant prays the judgment of this honorable court, whether he ought to be compelled to make any further or other answer to so much of the said bill as is hereby pleaded to, and he prays to be hence dismissed with his costs.

And for answer to such parts of the said bill as are not pleaded to, this defendant says that, etc. [Here insert answer as in precedents, under the head of answers.]

, Solicitor for defendant.

(For form of certificate of counsel and verification, see No. 47.)

FORM NO. 51.

Plea of former suit pending.

[Title as in Form No. 1.]

In Equity.

For plea, the defendant says that heretofore, to wit, on the day of , the said present complainant exhibited his bill of complaint in this honorable court against this defendant and one E. F., for an account of the moneys raised by the sale of the goods and property in the complainant's present bill mentioned, and claiming such shares and proportions thereof, and such rights and interests therein, as he now claims by his present bill; and praying relief against this defendant in the same manner and for the same matters, and to the same effect as the complainant now prays by his said present bill; and this defendant and said E. F. appeared and put in their answer to the said former bill, and the complainant replied thereto; and the said former bill, and the several proceedings in the said former cause, now remain depending and as of record in this honorable court, the said cause being yet undetermined and undismissed.

Wherefore, etc.

By , Solicitor for defendant.

(For form of certificate of counsel and verification, see No. 47.)

FORM NO. 52.

Common form of replication.

[Title as in Form No. 1.]

In Equity.

The replication of A. B., the above-named complainant, to the answer of C. D., defendant.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefits and advantage of exception which may be had and taken to the manifold insufficiencies of the said answer, for replication thereto says that he will aver, maintain and prove his bill of complaint to be true, certain and sufficient in the law to be answered unto; and that said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by repliant without this; that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things the repliant is and will be ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

G. F., Solicitor for complainant.

FORM NO. 53.

Order of reference to the master.

[Title as in Form No. 1.]

In Equity.

This cause having come on to be heard upon the motion of the complainant [or defendant] for, etc. [here insert the nature of the motion, and let the recital agree with the facts], the bill of complaint herein, the answer of the defendant thereto, the replication of the complainant to such answer, and the proofs taken in the cause, and having been argued by counsel for the respective parties;

Now, therefore, on consideration thereof, it is ordered, adjudged and decreed, and the court doth hereby order, adjudge and decree as follows, viz.: That this cause be and the same is hereby referred to the master in chancery of this court, to inquire and state to the

court, etc. [here insert the subject-matter of reference]; and for the better discovery of matter aforesaid the parties respectively are to produce before the said master all deeds, books, papers and writings in their possession, custody or power relating thereto, and are to be examined upon oath and interrogatories as the said masters shall direct; and the said master will cause to come before him all such witnesses whose testimony he may deem necessary, and examine them upon oath and interrogatories touching the matters aforesaid; and the said master will make his report thereon with all convenient speed; and if any special questions shall arise, the said master is at liberty to state the same to the court.

FORM NO. 54.

Order of reference to master to report, etc.

D. L., plaintiff,
v.
The Columbia Ins. Co., et al., defendants. } In equity.

Whereas it has been made to appear to this court, by the answer of the said defendants or otherwise, that at the time of the service of the subpœna and injunction of the said H. E. in this case, he held in his hands certain funds and promissory notes of the said Columbia Insurance Company as their agent; and that the said H. E. claims to have a lien thereon for a balance of account claimed by him to be due him by said company, and also for the reasonable expenses and counsel fees to which he has been subjected in answer to this and other suits against the said company, and other liens: This court doth order that this cause be referred to G. S. H., Esq., as a master in chancery, who, after due notice and hearing of the parties, shall report to this court what amount of funds and promissory notes or other *choses in action* belonging to said company were at the time of said subpœna and injunction, and what now are, in the hands or possession of said H. E.; also what balance of account, if any, was due said H. E. from said company at the date of said service; what reasonable sum for counsel fees or other expenses the said H. E. has paid, or is liable to pay or be at, in answering this and other suits now pending against the said company;

and also any other claims or demands which the said H. E. may have or claim to hold as a lien upon said funds or property of the Columbia Insurance Company aforesaid.

By the court. G. C. W., Clerk.

Form No. 55.

Order of reference to master; account; rests; state special circumstances, etc.

[Title of cause as in Form No. 1.]

In Equity.

On reading the pleadings in the above cause, and hearing the counsel of the respective parties, and on consideration thereof, it is ordered that it be referred to E. W., Esq., as a master of this court, to take an account of the dealings and transactions of and between the said parties under the several agreements set forth in the plaintiff's bill, and to state what, upon the balance of said account, shall appear to be due from either party to the other.

And the said master is required to make rests in said accounts, and state whether any and what balances were due from either and which of said parties to the other on the first day of April, A. D. 1850, as well as at the period at which the plaintiff in his said bill alleges said mutual accounts to have terminated.

And said master is authorized to state and report to the court any special circumstances needful for explaining said account in his report thereof, and the evidence as to the time when said mutual account did terminate.

And for the better taking of said accounts, etc., the parties are required to produce, etc., and to be examined before said master upon oath, either upon interrogatories or *viva voce*, or by each of said modes, as the said master may direct.

And all equities and further directions are reserved until the coming in of said report.

And the parties are at liberty to apply to the court as occasion may require.[1]

By the court. H. W. F., Clerk.

[1] Foster *v.* Goddard, 1 Cliff. 158 (1858).

FORM No. 56.

Master's report.

[Caption and title of cause as in Form No. 1.]

term, 18 . *In Equity.*

To the honorable , judge of the .

In pursuance of an order of this court, made in the above-entitled cause on the day of , 18 , whereby it was referred to the master in chancery [or a special master in chancery] of this court, to take the proofs of the respective parties, and report the same [with his conclusions of law thereon] to the court; I, the said master in chancery [or the special master appointed therefor by the court], do hereby report that, having first given a written notice to said parties respectively of the time and place when and where the said testimony would be taken, and caused to come before me all such witnesses as the respective parties desired or made known to me, and having been attended by the solicitor of the respective parties, I did, on the day of , 18 , at , in , proceed to take the proof of the respective parties; and the several witnesses attending having been severally sworn and examined by me, I reduced their testimony to writing, and have attached the same hereto, and made the same a part of this report.

I further report that [here insert the conclusion of facts].

I would further report that [here insert the conclusions of law, where that is required by the order of the court].

All of which is respectfully submitted.

G. H., Master in chancery.

Dated this day of , 18 .

FORM No. 57.

Exception to the master's report.

[Caption and title as in No. 1.]

In Chancery.

Now comes the defendant in the above-entitled cause and makes exceptions to the report of the master in chancery of this court [or

of the special master appointed by this court], to whom this cause was referred to take the proofs of the respective parties [or, to take the proofs of the respective parties and to state an account between them] and report the same [or, to take the proofs of the respective parties and report his conclusions of fact and of the law thereon] by an order of this court made on the day of , 18 ; and which report, executed in compliance with said order, bears date on the day of , 18 .

1. For that the said master has, etc.

2. For that the said master has, etc.

Whereas the said master should have, etc. [here state what he should have decided and reported].

Wherefore the defendant excepts to the said report and asks the judgment of the court thereon.

J. K., Solicitor for the .

Form No. 58.

Order where defendant appears, or is brought into court by attachment and admits his contempt, that he put in his answer within a specified time.

[Title as in Form No. 1.]

In Equity.

It appearing to the court that the defendant, C. D., being in contempt for not appearing or answering to the bill of complainant in this cause, a writ of attachment had issued against him, directed to the marshal of , returnable forthwith; whereupon the marshal has returned that he had attached the defendant, C. D., and had him in custody before the court; and the said C. D. now being before the court, and consenting to put in his answer in this suit, and to pay the costs of his contempt, when duly taxed; on motion of Mr. G. F., solicitor for the complainant, it is ordered that the said C. D. put in his answer to the bill of complaint within days from the date of this order, or that the complainant may apply to this court for such further order as may be just.

Form No. 59.

Order in case of contempt for not answering C. D., defendant denies his contempt; directing the filing of interrogatories, etc.

[Title of cause as in Form No. 1.]

In Equity.

It appearing to the court that the defendant, C. D., being in contempt for not appearing or answering to the bill of complaint in this cause, a writ of attachment had issued against him, directed to the marshal of , returnable forthwith; whereupon the marshal has returned that he had attached the defendant C. D., and had him in custody before the court; and the said C. D. being now before the court, and denying that he is guilty of the misconduct alleged against him, it is ordered that the complainant do within days file with the clerk of this court interrogatories specifying the facts and circumstances alleged against the said C. D., defendant, and that he serve a copy thereof on the said C. D.; and that the said C. D. put in written answers to such interrogatories, upon oath, and file the same within days after the time when such interrogatories are served on him, in the office of the clerk of this court. And it is further ordered that it be referred to the master in chancery of this court, to examine the said C. D., on oath, upon the said interrogatories; and to take such further proofs as either party may produce before him in relation to the alleged contempt; and that he report such answer and proofs to this court. And it is further ordered that the said marshal detain the defendant in his custody, and that the said C. D. attend, from day to day, before this court, until the further order of the court.

Form No. 60.

Order convicting defendant of a contempt after his examination upon interrogatories.

[Title of cause as in Form No. 1.]

In Equity.

A writ of attachment having been heretofore issued out of and under the seal of this court, against the defendant , for

his contempt in not answering the complainant's bill, directed to the marshal of the county of , and returnable forthwith; and the said marshal having returned that he had attached the said , and taken his body and had him in custody before the court; and the said having been, by virtue of such attachment, personally before the court on the said day of , instant, and denying the alleged contempt, it was thereupon ordered that the complainant in this cause should, within days, file in the office of the clerk of this court interrogatories specifying the facts and circumstances alleged against the said ; and that he serve a copy thereof on the said ; and that the said should put in written answers to such interrogatories, upon oath, and file the same within days after the service of such interrogatories; and that it should be referred to the master in chancery of this court to examine the said , on oath, upon such interrogatories, and to take such further proofs as either party might produce before him in relation to the alleged contempt; and it now appearing to the court, from the report of the said master and the answers and proofs thereto annexed, that the said has committed the contempt with which he is charged, and this court now adjudging him to have been guilty of the misconduct alleged, and that such misconduct was calculated to, or did actually, defeat, impair, impede or prejudice the rights of the complainant in this cause; it is therefore ordered that a fine of dollars be and the same is hereby imposed upon the said for his misconduct. And it is further ordered that the said do pay to the said complainant the costs and expenses of the proceedings for such misconduct, and now taxed at the sum of dollars. And it is further ordered that the said be and he is hereby directed to stand committed to the county jail in the county of , there to remain charged with this contempt until he shall have fully answered the said bill of complaint, and paid such fine and costs, unless the court shall see fit sooner to discharge him, and that a warrant issue for that purpose.

Upon this order a mittimus, or warrant of commitment for contempt in not appearing, will issue.

FORM NO. 61.

Order to refer second and third answers on the old exceptions.

[Title of cause as in Form No. 1.]

In Equity.

Exceptions having been heretofore taken to the answer of the defendant, C. D., and such answer having been reported insufficient in the matters of the first and fourth exceptions, the defendant has put in a second [or third] answer to the bill in this cause; which answer the complainant alleges to be insufficient in the matters of the first and fourth exceptions. It is therefore ordered that it be referred to the master in chancery of this court, to whom such exceptions were originally referred, to look into the bill of complaint, the answer of the defendant, and the said first and fourth exceptions, and to report whether such second [or third] answer is sufficient in the matters of the exceptions or not.

FORM NO. 62.

Order of reference when defendant does not submit to answer exceptions.

[Title of cause as in Form No. 1.]

In Equity.

Exceptions for insufficiency having been filed to the answer of the defendant, C. D., on the day of last, and the said C. D. not having submitted to answer said exceptions, it is ordered that it be referred to the master in chancery of this court, to look into said bill and answer of the defendant, C. D., and such exceptions, and report whether said exceptions are well taken or not.

FORM NO. 63.

Order for further answer after report of master.

[Title as in Form No. 1.]

In Equity.

The answer of the defendant, C. D., having been reported insufficient in the matters of the first and fourth exceptions thereto, by the master in chancery, to whom the exceptions of the com-

plainant to such answer were referred, and the report of the said master being approved by the said court, against the defendant, C. D., it is therefore ordered that the said C. D. put in a further answer to the matters of the first and fourth exceptions within days from this date, and pay the costs of such exceptions.

FORM NO. 64.

Interrogatories for the examination of a party in contempt for not answering.

[Title of cause as in Form No. 1.]

In Equity.

Interrogatories to be exhibited on the part of complainant, for the examination of , the defendant in this cause, pursuant to an order made in said cause on the day of , 18 .

First. Were you not, on or about the day of last, or at any other and what time, duly served with a summons in the above-entitled cause? When and by whom and how was such service made? Answer this interrogatory fully and particularly.

Second. Is not the writ of summons now shown to you the one served, and a copy of the same left with you? Answer fully.

Third. Were, etc. [Here insert such additional interrogatories as may be deemed necessary.]

, Solicitor for complainant.

FORM NO. 65.

Order for commitment of defendant for disobeying order to put in his answer.

[Title of cause as in Form No. 1.]

In Equity.

An order having been entered in this cause on the day of , 18 , requiring the defendant, , to put in his answer to the bill of complaint within days from the date of said order, or that in default thereof the complainant might be at liberty to apply to this court for such further order as might be just; and it appearing to the court that the defendant, ,

has failed to put in his answer as required by said order; and this court now adjudging the said to have been guilty of the misconduct alleged, and that such misconduct was calculated to, or did actually, defeat, impair, impede or prejudice the rights or remedies of the complainant in this cause, it is thereupon, on motion of Mr. , solicitor for the complainant, ordered that the said be and he is hereby ordered to stand committed to the common jail of the county of , there to remain charged upon this contempt until he shall have put in his answer as aforesaid; unless the court shall see fit sooner to discharge him. And it is further ordered that a warrant issue for that purpose.

Form No. 66.

Order for marshal to arrest for contempt.

[Title of cause as in Form No. 1.]

In Equity.

The defendant, C. D., being in contempt for not appearing and answering to the bill of complaint in this cause, and a commission of rebellion having been heretofore issued out of and under the seal of this court, directed to certain commissioners therein named, commanding them to attach the said C. D., as a rebel and contemner of the law, and to have him before this court on the day of instant; and the said commissioners having returned that they had made diligent search and inquiry after the said C. D., so as to attach his body by virtue of the said commission, but notwithstanding all their endeavors they could not meet with him for that purpose, as by such commission and the return thereto appears: it is thereupon ordered that the marshal, now attending this court at its present term, and executing all the powers and duties of a *sergeant-at-arms*, do forthwith go and take the said C. D. into his custody, and him safely keep and bring him immediately into this court, before the court to answer for his contempt, and to do and receive what this court shall thereupon further order in the premises. And it is further ordered that the said marshal do with all convenient speed certify to this court, under his hand, his doings in the premises.

Upon this order a warrant to the marshal will issue.

Form No. 67.

Order for a sequestration.

[Title of cause as in Form No. 1.]

In Equity.

The defendant being in contempt for not appearing and answering the bill of complaint in this cause, and a warrant having been issued to the marshal of the county of , attending the court at its *present* term, and as such executing all the duties of a *sergeant-at-arms*, requiring him forthwith to go and take the said into his custody and bring him into this court to answer for his contempt, in pursuance of an order of this court made on the day of ; and the said marshal, acting as *sergeant-at-arms*, having returned that he had made diligent search and inquiry after the said , but that he did so abscond and secrete himself that he could not be found to be apprehended, as by the said warrant and the return thereof appears: it is therefore ordered that a commission of sequestration do issue against the said , directed to E. F., G. H. and J. K., commissioners, directing them to sequester the defendant, , personal estate, and the rents, issue and profits of his real estate, until the defendant, , shall appear to the bill of complaint in this cause, clear his contempt, and this court shall make an order to the contrary.

Upon this order being made, a writ of sequestration will issue.

Form No. 68.

Order for examination of defendant on interrogatories, etc., on third answer being held insufficient.

[Title as in Form No. 1.]

In Equity.

The third answer of the defendant, , having been reported insufficient, on a reference to the master upon the original exceptions, in the matters of the first and fourth exceptions, and the report of the said master having been filed, and having become absolute, an attachment was thereupon issued against the said , in pursuance of an order of this court rendered on the day of last. And the said , now

being personally before the court by virtue of the said attachment, and this court now adjudging the defendant to have been guilty of the misconduct alleged, and that such misconduct was calculated to, or actually did, defeat, impair, impede or prejudice the rights or remedies of the complainant in this cause; it is therefore ordered that the said be examined upon interrogatories before the master in chancery of this court, to the points wherein his said third answer is reported insufficient; and that he stand committed to the common jail of the county of , until he shall have answered such interrogatories to the satisfaction of the said master, and paid the costs incurred by reason of his default, now taxed at dollars; and that a warrant issue for that purpose. And it is further ordered that the marshal of said county do keep the defendant in his actual custody until the court shall have made some order in the premises, and that he take the said before the said master to be examined, at such times as such master shall appoint.

Form No. 69.

Order for an attachment on third answer being held insufficient.

[Title as in Form No. 1.]

In Equity.

The third answer filed by the defendant, , having been reported insufficient, on a reference to the master in chancery upon the original exceptions, in the matters of the first and fourth exceptions, and the report of said master having been filed and having become absolute, it is ordered that an attachment issue against the defendant, .

Form No. 70.

Order for temporary injunction.

[Caption and title of cause as in Form No. 1.]

In Equity.

On reading and filing the bill of complaint in this cause, affidavits, etc., and on motion of J. E., solicitor for complainant, ordered

that the defendant show cause at the next special term of this court to be held at , on the day of next, why a general injunction should not issue against him as prayed for by the said bill of complaint, and that in the meantime a temporary injunction be issued in this cause, according to the prayer of the said bill.

FORM NO. 71.

Order allowing the complainant to dismiss his bill.

[Title of cause as in Form No. 1.]

In Equity.

The complainant applying to dismiss his bill in this cause, on motion of Mr. , solicitor for complainant, it is ordered that leave to dismiss the same be granted accordingly, on the complainant paying to the defendant his costs in this suit, to be taxed.

FORM NO. 72.

Order to pay money into court.

[Title of cause as in Form No. 1.]

In Equity.

On reading and filing the bill and answer in this cause, and on motion of Mr. , solicitor for the defendant, in opposition to said motion, it is ordered that the defendant, , do, within days from the date of this order, pay into the hands of the clerk of this court, in trust in this cause, the sum of dollars, admitted by the answer of the defendant to be due from him; and that when such money is paid in it be deposited by said clerk, in trust, in the bank of , to the credit of this cause, there to remain until the further order of this court.

FORM NO. 73.

Order directing plea to stand for an answer.

[Title of cause as in Form No. 1.]

In Equity.

The plea of the defendant, C. D., to the bill of complaint in this cause having heretofore come on to be argued, and counsel for the

respective parties having been heard thereupon, it is ordered that the said plea do stand for an answer, with liberty to the complainant to except thereto.

FORM NO. 74.

Order of reference of a plea of former suit pending.

[Title of cause as in Form No. 1.]

In Equity.

On filing a plea in this cause averring that there is a former suit depending in this court for the same matters as are involved in the present suit, it is therefore ordered that it be referred to the master in chancery of this court, to look into the bill and the plea in this cause, and the bill in the said plea alleged to have been exhibited by the complainant against the defendant previous to the commencement of this suit, and into the other pleadings and proceedings therein, and to report whether the said plea is true.

FORM NO. 75.

Order for cause to stand over to add new parties.

[Caption and title of cause as in Form No. 1.]

In Equity.

This cause coming on to be heard this day, and counsel for both parties having been in part heard, and it appearing to the court that E. F. and G. H. are necessary parties to this cause, it is ordered that this cause do stand over, to the end that the complainant may make the said E. F. and G. H. parties thereto, either by amendment or supplemental bill, as he may be advised.

FORM NO. 76.

Order for cause to stand over to supply proofs.

[Title of cause as in Form No. 1.]

In Equity.

This cause coming on to be heard this day, and counsel for both parties having been in part heard; and it appearing to the court that the complainant has omitted to introduce proof of the death of E. F., his intestate, it is ordered that this cause do stand over,

to the end that the complainant may examine witnesses to prove the death of such intestate.

FORM No. 77.

Master's report upon exceptions to answer for insufficiency.

In the court, etc., term, 18 .

A. B.
v.
C. D. } In chancery.

To the honorable , judge of the court of the county of , in the state of . In chancery sitting:

In pursuance of an order of this court made in the above-entitled cause, on the day of , 18 , whereby it was referred to me, as master in chancery of this court, to look into the complainant's bill of complaint, the answer of the defendant, , and the exceptions taken to said answer by the complainant, and report whether said exceptions are well taken or not:

I, the master in chancery, do hereby respectfully certify and report that, having been attended by the counsel of the respective parties, and having looked into said bill and answer and the exceptions taken thereto, and having fully considered the same, I find that the first and fourth exceptions to said answer are well taken, and that the second, third and fifth exceptions are not well taken.

All of which is respectfully submitted.

, Master in chancery, county.

FORM No. 78.

Exceptions to master's report on exceptions to answer.

[Caption and title of cause as in Form No. 1.]

In Equity.

Exceptions taken by the complainant to the report of the master in chancery of this court, to whom it was referred to report as to the exceptions filed to the answer of the defendant.

First. For that the said master has, in and by his said report, certified that, etc. [Here set out the words of the report.] Whereas

the said master ought to have certified that the exceptions to the answer of the defendant, , were well taken, and that the said answer of the defendant, , was imperfect, insufficient and evasive in the particulars excepted to.

Second. For that the said master has certified, etc. (and so on).

In all of which particulars the report of the said master is erroneous, and the complainant appeals therefrom to the judgment of this honorable court.

, Solicitor for complainant.

Form No. 79.

Master's report as to sufficiency of defendant's examination.

[Title of cause as in Form No. 1.]

To the honorable , judge of the court of the county of , in the state of . In chancery sitting:

In pursuance of an order of this court made in the above-entitled cause, on the day of , 18 , whereby it was referred to me, as master in chancery of this court, to examine the defendant, , on interrogatories to the points wherein his third answer to the bill in this cause was reported insufficient; I, the said master, do hereby respectfully certify and report that, having been attended by the counsel for the respective parties, and having caused the said to be brought before me, I examined him upon oath upon the written interrogatories filed for that purpose, and also *viva voce*, and that his examination thereto is contained in a schedule hereto annexed, marked A. And I do further certify and report that, in my opinion, the said examination is sufficient.

All of which is respectfully submitted.

Dated at, etc. , Master in chancery.

Form No. 80.

Commission to take testimony.

[Caption and title of cause as in Form No. 1.]

The President of the United States of America to A. B., *Greeting:*

Know ye, that we, in confidence of your prudence and fidelity, have appointed you, A. B., commissioner, and by these presents do

give you, A. B., full power and authority diligently to examine upon corporal oath or affirmation, before you to be taken and upon the interrogatories hereunto annexed, C. D. and E. F. as witnesses on the part of the [plaintiff or defendant] in a certain cause now pending and undetermined in the circuit court of the United States of America for the district of New York, second circuit, wherein is plaintiff and is defendant.

And we do further empower you, A. B., to examine on the same behalf, and in like manner, any other person or persons who may be produced as a witness before you; and we do hereby require you, A. B., before whom such testimony may be taken, to reduce the same to writing and to close it up under your hand and seal, directed to , clerk of said court, as soon as may be convenient after the execution of this commission; and that you return the same, when executed as above directed, with the title of the cause endorsed on the envelope of the commission.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Washington, this day of , in the year of our Lord one thousand eight hundred and , and of our independence the .

Joseph M. Duvel, Clerk.

G. H., Attorney.

Form No. 81.

Commission of dedimus protestatum.

[Caption and title of cause as in Form No. 1.]

The President of the United States of America, to A. B., C. D. and E. F., *Greeting:*

Know ye, that in confidence of your prudence and fidelity, you have been appointed, and by these presents you, or any two or more of you, are invested with full power and authority to examine on his corporal oath, as a witness in a case depending in the circuit court of the United States for the circuit and district of (or, in the district court of the United States in and for the district of), wherein is plaintiff and defendant, on the part of the upon the interrogatories annexed to this commission; and therefore

you are hereby commanded that you, or any two or more of you, at certain days and places to be appointed by you for that purpose, do cause the said to come before you, and then and there examine him on oath upon the said interrogatories, and that you take such examination and reduce the same into writing, and return the same annexed to this writ, closed up under your seals, or the seals of any two or more of you, into the said circuit (or district) court, before the judges (or judge) thereof, with all convenient speed.

Witness, etc.

[The interrogatories and cross-interrogatories (if any) to be annexed to the commission, and the depositions, are to be drawn up in the usual form.]

Form No. 82.

Affidavit for habeas corpus ad testificandum.

United States circuit court, district of .

A. B. }
v. } *ss:*
C. D. }

, of , the above-named plaintiff, maketh oath and saith that , now a prisoner for debt (as the case may be) in the custody of the sheriff of (or as the case may be), is a material witness for this deponent at the trial of this cause, without whose testimony, as he is advised by his counsel and verily believes, this deponent cannot safely proceed to the trial thereof.

Sworn, etc.

Form No. 83.

Abstracts of pleadings, etc.

In the court, etc., term, 18 .

A. B. }
v. } In chancery.
C. D. }

The bill in this cause was filed on the day of , 18 , and the replication on the day of , 18 .

The following witnesses were examined on the day of , 18 , before the master in chancery, in pursuance of an order of referee, made on the day of , 18 , to wit, E. F. and G. H. on the part of the complainant, and J. K. and L. M. on the part of the defendant. The following documents were also produced, to wit, etc.

The object of the bill is to procure a conveyance from the defendant of the real estate described in the bill, and being the, etc. [Here insert the description.]

FORM No. 84.

Agreement to submit the cause on printed arguments.

In the court, term, 18 .

A. B.
v.
C. D. } In chancery.

It is stipulated and agreed that this cause be submitted to the court on printed arguments; the complainant's counsel to serve his argument within days, and the defendant's counsel to answer the same within days thereafter, and the complainant's counsel to reply within days after the defendant's argument shall have been served.

Dated, etc. , Solicitor for complainant.
, Solicitor for defendant.

FORM No. 85.

Abstract of pleadings and points in issue.

[Title of cause as in Form No. 1.]

In Equity.

BILL.	ANSWER.
States that before complainant purchased lot 7, etc., L. M. owned the improvements, etc.	Admitted. But the defendant on, etc., purchased of L. M. all the improvements.

Lot 9 was leased to L. M. on, etc., but by an agreement, etc.	Denies, etc.
On the day of , etc., both parties, etc.	Substantially admitted.
Complainant paid, etc.	Denied.
Usual charge of confederacy, etc.	
Answer on oath prayed for.	
Prayer for injunction, that defendant may be decreed to execute conveyance, and for general relief.	General traverse, and usual conclusion.
Replication.	

EVIDENCE.

For complainant, E. F. testifies that, etc.	For defendant, J. R. testifies that, etc.
G. H. testifies that, etc.	L. M. testifies that, etc.

FORM NO. 86.

Briefs and points on hearing.

In the court, etc., term, 18 .

A. B.
v.
C. D.
} In chancery.

I.

The complainant has a perfect remedy at law whereby he may avail himself of every ground of complaint set forth in the bill.

Authorities cited.

II.

The court of chancery will not assume jurisdiction in this case upon the ground of its being a bill of peace. Because,

First. The bill is filed only against a single party, which party has neither commenced nor threatened to commence a multiplicity of suits, etc.

Second. The apprehensions of the complainant that, etc.

Third. That, etc.

Authorities cited.

III.

The defendants are authorized by the act of, etc., to pass the ordinance in question.

Authorities cited.

IV.

The ordinance is a reasonable regulation of trade, etc.

Authorities cited.

FORM NO. 87.

Decree on staying infringement after verdict establishing patent; temporary injunction.

[Title of cause as in Form No. 1.]

In Equity.

The court doth order that an injunction be awarded to restrain the defendants, C. and D., etc., their agents, servants and workmen, during the continuance of the letters patent in the plaintiffs' bill mentioned, and whilst the same may be in force, from using or employing without the leave or license of the plaintiffs, in or for the purpose of the folding of the flaps of envelopes in succession one after the other, or for the gumming or cementing together the edges of such flaps and causing such edges to adhere together whilst in course of being folded, any machines similar to the machine which was produced for inspection at their factory on the day of , as in the plaintiffs' bill stated, or any machinery, mechanism or mechanical contrivance made or arranged according to the plaintiffs' said patent inventions, or differing therefrom only colorably or by the substitution of mere mechanical equivalents for the same, and from folding the flaps of envelopes in succession one after the other, and gumming or cementing the edges of such flaps and causing the same to adhere together whilst such flaps are in course of folding by means of any such machine, machinery, mechanism or mechanical contrivances, and from selling or offering for sale any envelopes which have been heretofore manufactured by the said defendants, their agents, servants or workmen, and in the manufacture whereof any such machine, machinery or mechanical contrivance hath or have been used or employed for the purpose of folding the flaps of such envelopes in succession, or for gumming or

cementing, or causing the same to adhere together whilst such flaps have been in the course of being folded, and generally from making, using, exercising, putting in practice or vending plaintiffs' patent inventions, or any or either of them, without their license or authority, and from or in anywise conterfeiting, imitating or resembling the same, until, etc.[1]

Form No. 88.

Decree of validity of patent in reference to an infringement; account and perpetual injunction.

[Title of cause as in Form No. 1.]

In Equity.

R. W., H. S. and D. B. W. *v.* H. B., Jr., and H. F.

This cause having been brought to a final hearing upon the pleading and proofs, and counsel for the respective parties having been heard and the same having been duly considered by the court: It is found and hereby ordered, adjudged and decreed that the letters patent No. 12,649, granted unto the said R. W., April 3, 1855, is a good and valid patent, being the patent referred to in the plaintiffs' bill, and that the said R. W. was the original and first inventor of the improvement described and claimed in the said patent; and also that the said defendants have infringed upon the said patent, and upon the exclusive rights of the plaintiffs under the same.

And it is further ordered, adjudged and decreed that the plaintiffs do recover of the defendants the profits, gains and advantages which the said defendants or any or either of them have received or made, or which have arisen or accrued to them or either of them from said infringement of said patents, by the manufacture, use or sale of the improvements described and secured by the said letters patent at any and all times since the seventeenth day of November, 1856.

And it is further ordered, adjudged and decreed that the said plaintiffs do recover of the defendants their costs and charges and disbursement in this suit, to be taxed.

And it is further ordered, adjudged and decreed that it be re-

[1] De la Rue *v.* Dickinson, 2 Seton Dec. (Eng. ed., 1862) 911.

ferred to K. G. W., one of the masters of this court, residing in the city of New York, to ascertain, take and state and report to the court an account of the gains, profits and advantages which the said defendants or either of them have received, or which have arisen or accrued to them or either of them from infringing the said exclusive rights of the said plaintiffs by the manufacture, use and sale of the said improvements patented in said letters patent, since the said seventeenth day of November, 1856.

And it is further ordered, adjudged and decreed that the plaintiffs, on such accounting, have the right to cause the examination of said defendants, and each of them, *ore tenus* or otherwise, and also to the production of the books, vouchers and documents of each of them, and that the said defendants attend for such purpose before said master from time to time as said master shall direct.

And it is also further ordered, adjudged and decreed that a perpetual injunction be issued in this suit against the said defendants, according to the prayer of this bill.

Form No. 89.

Decree of Supreme Court where the court has no jurisdiction.

[Title of cause as in Form No. 1.]

In Equity.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Massachusetts, and was argued by counsel. On consideration whereof it is the opinion of this court that neither the said circuit court nor the district court from which this case was removed to the said circuit court had jurisdiction of this cause, and that consequently this court has not jurisdiction but for the purpose of reversing the decree of the said circuit court. Whereupon it is now here ordered and decreed by this court that the decree of the said circuit court entertaining jurisdiction in this cause be and the same is hereby reversed for the want of jurisdiction in that court, and that this appeal be and the same is hereby dismissed for the want of jurisdiction; and that this cause be and the same is hereby remanded to the said circuit court, with directions to proceed therein in conformity to the opinion of this court.

Form No. 90.

Decree of perpetual injunction upon printing, publishing, etc.

[Title of cause as in Form No. 1.]

In Equity.

This cause came on to be heard, at this term, upon the bill and answer and the master's report, and was argued by counsel; on consideration whereof, it is ordered, adjudged and decreed by the court that the master's report be and the same hereby is approved and confirmed; and thereupon it is further ordered, adjudged and decreed by the court that said defendants be and they hereby are severally and perpetually restrained and enjoined from printing, publishing, selling or exposing to sale, or causing or being in any way concerned in the printing, publishing, selling or exposing to sale of, any copy or copies of the whole or any part of the three hundred and fifty-three pages copied, as reported by the master, in said Life of Washington, mentioned in the bill and answer, published by the defendants, from the Life and Writings of Washington, mentioned in the bill and answer, published by the plaintiffs, the plaintiffs waiving the account prayed for in the bill, the court does not order such account.[1]

Form No. 91.

Decree for perpetual injunction, restraining the constructing, using or selling of a planing-machine.

[Title of cause as in Form No. 1.]

In Equity.

This cause having been brought on to be heard upon pleadings and proofs, and Mr. Wm. H. Seward having been heard on the part of the plaintiff, and Mr. Marcus T. Reynolds on the part of the defendants, and due deliberation having been had, it is ordered, adjudged and decreed* that the defendants in this cause be and they

[1] Folsom *v.* Marsh, 2 Story C. C. 100.

are hereby perpetually enjoined from any further constructing or using in any manner, and from selling and disposing in any manner of, the two planing-machines mentioned in said bill as erected by them in the town of Watervliet, in the county of Albany, or either of said machines, which machines are machines for dressing boards and planks by planing, tonguing or grooving, or either, together or in some separate combination constructed upon the principle and plan specified and described in the schedule annexed to letters patent issued to Wm. W. Woodworth, administrator of Wm. Woodworth, on the 8th day of July, 1845; which letters were a renewal upon a formal surrender for an imperfect specification of letters patent issued to Wm. Woodworth on the 27th day of December, 1820, and extended on the 16th day of November, 1842, to take effect on the 27th day of December, 1842, and again extended by act of Congress on the 26th day of February, 1845, and from infringing upon and violating the said patent in any way whatsoever.

And it is further ordered, adjudged and decreed that it be referred to Julius Rhodes, Esq., of Albany, counsellor-at-law, as a master pro hac vice in this cause, with the usual powers of a master of this court, to ascertain and report the damages which the plaintiff has sustained, arising from the infringement of his rights by the defendants, by the use of the said two machines by them.

And it is further ordered that the report of the said master herein may be made either to this court in term time or to one of the judges thereof at chambers in vacation; and that either party may, on ten days' notice to the other of time and place, apply either to this court in term time or to one of the judges thereof at chambers in vacation for confirmation of such report.

And it is further ordered that either party may at any time, on ten days' notice of time and place to the other, apply to this court in term time, or to one of the judges thereof in vacation, for further directions in the premises.

And the question of costs, and all other questions in this cause, are hereby reserved until the coming in of the said report.

And the complainant shall either pay to the defendants, or set off against the damages to be awarded, the sum of two thousand dollars, which he offered in his bill to pay them, with interest from the 5th of December, 1845.

Form No. 92.

Decree of perpetual injunction on the use of another's trade-marks.

[Title of cause as in Form No. 1.]

In Equity.

This cause came on to be heard at this term upon the bill, answer and proofs in the cause, and was argued by counsel on behalf of the plaintiffs, no counsel appearing for the defendant [the counsel who had previously appeared for him having voluntarily withdrawn from the cause].

On consideration whereof, it is ordered, adjudged and decreed by the court that a perpetual injunction be granted in the premises according to the prayer of the bill, and that the plaintiffs do recover costs against the defendant, to be taxed by the clerk under the direction of the court.[1]

Form No. 93.

Order staying the use of a trade-mark as to cutlery.

[Title as in Form No. 1.]

In Equity.

This court doth order that an injunction be awarded to restrain the defendants, W. etc., respectively (and every and each of them), and the respective servants, agents and workmen of the said defendants (and of every and each of them), from stamping, cutting or engraving, or causing or permitting to be stamped, cut or engraved upon any tools or other articles manufactured for or bought or sold by them, the words "Collins & Co., Hartford, Cast Steel, Warranted," or any other words similar to or only colorably differing from such words, or any words or marks so contrived as to represent or lead to the belief that the said tools or other articles were the manufacture of the said Collins & Co.; and from affixing or causing to be affixed to any tools or other articles manufactured for or bought, procured or sold by them, or otherwise using or employ-

[1] Taylor *v.* Carpenter, 3 Story C. C. 458.

ing, or causing or permitting to be used or employed, any labels containing the words (etc., as above), or any label or labels similar to or only colorably differing from the labels made or used by the said company as in the plaintiff's bill mentioned, or so contrived and prepared as to represent or lead to the belief that the tools or other articles manufactured or sold by the defendants were the manufacture of the said company; and also from selling, exporting, consigning or otherwise disposing of any tools or other articles having or bearing thereon any such words, marks or labels as in the said bill mentioned, or any other words, marks or labels only colorably differing from the said marks and labels of the said company, until, etc.

Form No. 94.

Order for temporary injunction to restrain defendant until answer is put in.

[Title of cause as in Form No. 1.]

In Equity.

The President of the United States of America to C. D., and to his counsellors, attorneys, solicitors and agents, and each and every of them, *Greeting:*

Whereas it has been represented to us in our court of chancery, on the part of A. B., complainant, that he has lately exhibited his bill of complaint in the circuit court of the United States for the circuit, against you, the said C. D., to be relieved touching the matters therein complained of; in which bill it is stated, among other things, that you are combining and confederating with others to injure the said complainant touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience. We, therefore, in consideration thereof, and of the particular matters in the said bill set forth, do strictly command you, the said C. D., and the persons before mentioned, and each and every of you, under the penalty of ten thousand dollars, to be levied upon your bonds, goods and chattels to our use, that you do absolutely desist and refrain from until you, the said C. D., shall have put in your answer

in this cause, and our said court shall have made further order thereupon.

Witness, , Chief Justice of the United States, at , the day of , one thousand eight hundred and forty-three.

, Register [or clerk].

, Solicitor.

Endorsed "By the court." , Register.

FORM No. 95.

Final decree, dismissing bill at the hearing.

[Title of cause as in Form No. 1.]

In Equity.

(*Proceed as in Form No.* 91, *ante, p.* 688, *to the* *, *and continue:*) That the complainant's said bill of complaint be and the same is hereby dismissed, with costs to the defendant to be taxed. .

FORM No. 96.

Decretal order. Another form.

[Title same as in Form No. 1.]

In Equity.

This cause having been heretofore heard on argument by counsel for the respective parties, on the pleadings and proofs, and the court having considered the same, and being of the opinion that the complainant was the first and original inventor of the as described and claimed in his patent, adjudges and decrees that the defendant has infringed the said patent in making and vending the [patented article, whatsoever it may be], as charged in the said bill of complaint, and that the said complainant is entitled to have a perpetual injunction to restrain said defendant, his agents, servants, and all claiming or holding under or through him, from making, vending or using, or in any manner disposing of [the patented arti-

cle] embracing the invention or improvements described in said letters patent, namely [describe the patented article].

And it is further adjudged and decreed that the cause be referred to , esquire, the clerk of this court [or , esquire, a master pro hac vice], to ascertain and report the number of [describe patented article] made and also the number sold by the said defendant since the day of , A. D. 18 , and the damages complainant has sustained, or use and profits the defendant has derived by reason of such infringement since the time last aforesaid.

And upon the coming in and confirmation of the said report that said complainant have a decree and execution for the amount found due to him, and also for the costs in this suit to be taxed.

FORM No. 97.

Master's summons.

[Title of cause same as in Form No. 1.]

In Equity.

In pursuance of the authority contained in a decretal order, made in the above-entitled cause by the Hon. , one of the judges of this court, at a term, held at , in said district, on the day of , 18 , I, the subscriber, one of the masters of the said court, do hereby summon you, , as defendant [or to appear for a personal examination and to produce all books, vouchers and documents concerning accounts in this suit, or A. B. and C. D. as witnesses], to appear before me, , in said district, on the day of , 18 , at o'clock in the noon, to attend a hearing before me, the said master, of the matters in reference in the said cause, to be had by virtue of the order of the said court above referred to. And hereof you are not to fail at your peril.

C. H., Master in equity.

Dated the day of , 18 .

I direct the above summons to be served previous to the return thereof, days.

C. H., Master in equity.

FORM NO. 98.

Master's report.

[Title as in Form No. 1.]

In Equity.

To the Hon. , judges in said court:

In pursuance of a decretal order made and entered in this cause, and bearing date on the day of , A. D. 18 , at a stated term of this court held at the , in the city of , by which it was referred to C. H., Esq., of , one of the masters of this court, to take and state an account of the *use, gains and profits* by defendants in the manufacture and sale of [machine or other article] described in the plaintiff's bill of complaint, and which the complainant would have received but for the infringements and unlawful acts and doings of the said defendants as specified therein, I, the subscriber, a master in said court, do respectfully report that I have proceeded to investigate the matters so referred to me, and that, pursuant to a summons duly issued, I have been attended by the plaintiff's solicitor, G. F., Esq., and also by C. D. and E. F., defendants, in the city of , aforesaid, where, after taking due proofs, I find and report that the amount thereof is the sum of dollars.

I do, therefore, respectfully report that the said defendants should be decreed to pay the said plaintiff the sum of dollars, besides costs to be taxed.

I respectfully refer to schedules A, B, C, hereto annexed, as making a part of this my report.

All which is respectfully submitted.

C. H., United States master.

Dated,

FORM NO. 99.

Exceptions to report.

[Title as in Form No. 1.]

In Equity.

Exceptions taken by the to the report made herein by C. H., the master pro hac vice, to whom this cause was re-

ferred by an order of this court on the day of , A. D. 18 , and by the decree made herein on the day of , A. D. 18 , which report bears date the day of , A. D. 18 .

First exception. For that the master in his report, etc. [here state exception].

Second exception. For that, etc.

Form No. 100.

Order for a feigned issue, etc.

[Title as in Form No. 1.]

In Equity.

A motion having been made in this cause on the part of the defendants for a feigned issue to try the validity of complainant's patent for an improvement in , and also for leave to amend the answer on file, or to file a supplemental answer, on hearing Mr. , on the part of the defendants, and Mr. , on the part of the complainant, ordered: that a feigned issue be granted, and that the following questions be tried at law at the next circuit court of the United States, to be held at , viz.:

1st. Whether or not the complainant is the first and original inventor of the improvement in , for which the above patent has been granted?

2d. Whether or not the manufactured by the defendants are substantially identical with those of the complainant in their construction and mode of operation?

3d. If an infringement is made out by the complainant, what amount of damages has been sustained by him?

And it is further ordered that the defendants have leave to file an amended answer or a supplemental answer to the bill filed within thirty days from the service of a copy of this order.

And it is further ordered that the defendants give the same notice of the defence on the trial of the above issue at law, and within the same time that would be required if the trial was in a suit at law.

Form No. 101.

Final decree.

[Title as in form No. 1.]

In Equity.

This cause having been heretofore brought to a hearing upon the report of , Esq., of the court, to whom it was referred, to ascertain and report the number of embracing the principle of the complainant's invention, as described and claimed in his patent, as mentioned and set forth in the bill of complaint in this cause that had been made, and also the number sold by the said defendants, or either of them, since the day of , 18 , and the damages the complainant had sustained, or use and profits the defendant, , had derived by reason of the infringement of such patent since the time last aforesaid, which report bears date ; and also upon exceptions taken to the said report on the part of said complainant; and also on the part of the said defendants, and upon the equity reserved, and the said cause having been argued by , counsel for the said complainant, and by , counsel for the defendants, and due deliberation had thereon:

It is ordered, adjudged and decreed, and this court doth hereby order, adjudge and decree, that [here state the decree].

It is further ordered, adjudged and decreed, and this court doth further order, adjudge, determine and decree, that the said defendants are respectively liable to the said complainant.

And it is further ordered, adjudged and decreed, and this court doth order, adjudge and decree, that each of the said defendants pay to the said complainant [here state the amount adjudged].

And it is further ordered, adjudged and decreed that the said defendants pay to the said complainant his costs in this suit, to be taxed, and that have execution for such costs, and for the sums above decreed, to be paid as aforesaid.

FORM NO. 102.

Taxed costs.

[Title as in Form No. 1.]

In Equity.

Solicitor's fee, ...	$20 00
Disbursements:	
Paid postages and express charges, ...	
Paid for certified papers, ...	
Depositions at $2 50, taken and used, ...	
Marshal's fees:	
Serving subpœnas at $2 each, ...	
Travel at 6 cts., going from place of service to place of return, miles, ...	
Clerk's fees:	
Filing bill of complaint, 10 cts.; entering order, 15 cts.,	25
Copying order, 10 cts.; certificate and seal, 35 cts., .	45
Issuing subpœna, ...	1 00
Copies subpœnas, 2 folios, 20 cts.; certificate 35 cts., being at 55 cts. per copy, ...	
Filing subpœna and entering return of service, . .	25
Copying order on defendant's appearance, 1 folio certified,	45
Copying defendant's answer; folio at 10 cts. and certificate 35 cts., ...	
Filing replication, ...	10
Filing depositions and papers at 10 cts. each, . .	
Issuing injunction, $1; copies, 4 folios certified at 75 cts.	
Copying depositions, folios at 10 cts., $; certificate, 35 cts., ...	
Making and enrolling decree, folios at 15 cts., . .	
Copying enrolled decree, folios at 10 cts., $, and certificate 35 cts. (if required), ...	
Final fee on issue, docketing, indexing, etc., . . .	3 00
Issuing execution, $1; filing execution and entering return, 25 cts., ...	1 25
	$

Taxed at $ this day of , A. D. 18 .

, Clerk.

Form No. 103.

Perpetual injunction.

In Equity.

The President of the United States of America to , and to counsellors, attorneys, solicitors and agents, and each and every of them, *Greeting:*

Whereas it has been represented to us in our circuit court in equity for the district of New York, on the part of , plaintiff, that have lately exhibited bill of complaint in our said circuit court for the district of New York, against you, the said , to be relieved touching the matters therein complained of; in which bill it is stated, amongst other things, that you are combining and confederating with others to injure the said plaintiff touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience: We, therefore, in consideration thereof, and of the particular matters in the said bill set forth, do strictly command you, the said , and the persons before mentioned, and each and every of you, under the penalty of ten thousand dollars, to be levied on your lands, goods and chattels, to our use, that you do absolutely desist and refrain from until the further order of our said circuit court.

Witness , Chief Justice of the Supreme Court of the United States, at the city of , the day of , one thousand eight hundred and .

, Clerk.

G. F., Solicitor.

Form No. 104.

Revised decree; form of entry.

[Title of cause as in Form No. 1.]

In Equity.

The above-named defendants, , heretofore duly appealed to the Supreme Court of the United States, from certain parts of the final decree made by this court in this cause, and bearing date the ; and the said Supreme Court of the United States,

having at the term, 18 , duly heard the said appeal upon the transcript of the record, and having thereupon ordered, adjudged and decreed that so much of the said decree of this court as allows the said complainant costs, and the sum of for interest on the profits found for him, was erroneous, and should be reversed and annulled, and that the residue of the said decree of this court should be affirmed; and the said Supreme Court having remanded the said cause to this court, with instructions that such proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding, which said decree, order and instructions appear to this court by the mandate of the said Supreme Court:

Now, therefore, on filing the said mandate, ordered [here enter as required by the mandate].

Form No. 105.

Enrollment of decree.

At a term of the circuit court of the United States for the district of , held at the city of , in the said district, on the day of , A. D. 18 .

Present:—The honorable , one of the judges of said court.

A. B.
v. } In equity.
C. D.

The plaintiff, , filed his bill of complaint, which is hereto annexed, on the day of , 18 , against the defendant, ; a subpœna to appear and answer in said cause was thereupon issued, returnable on the day of , 18 , and was served personally previous to the return day thereof on the defendant.

The defendant appeared in said cause by as his solicitor.

On the day of , 18 , the defendant filed his answer to said bill, which answer is hereto annexed.

A replication to said answer was filed on the day of , 18 , which replication is hereto annexed.

That on the day of , 18 , a report, and the

oral and written evidence, proofs and exhibits referred to therein, as hereto annexed, were all duly filed.

On the day of , 18 , the defendant filed his exceptions to said report, which exceptions are hereunto annexed.

On the day of , 18 , the plaintiff filed his exceptions to said report, which exceptions are hereunto annexed.

On the day of , 18 , the said cause having been previously brought to a hearing, a final decree was made and entered therein in the words and figures following, to wit: [Here insert the decree.]

Whereupon the said pleadings, proofs, orders and final decree and tax costs, together with other papers in said cause, are duly annexed hereto, and this decree is duly signed, filed and enrolled, pursuant to the rules and practice of the court.

E. K., Judge [or clerk].

FORM NO. 106.

Taxed costs to plaintiff; law.

United States circuit court, district of New York.

A. B. } Plaintiff's costs on trial, after verdict.
v. }
C. D. }

Attorney's fee by statute, ...	$20 00
Disbursements:	
Taking 4 depositions at $2 50 each, ...	10 00
Witnesses' fees paid, viz., A, B, C, one day's attendance, $1 50 each, is	4 50
Miles travel, at 10 cts. one way, ...	7 40
Certified copy papers obtained and used, ...	3 00
Postage and express charges paid out, ...	24
Models paid for and used in court, if any, . . .	7 00
Marshal's fees:	
Serving subpœnas at 50 cts. each witness, . . .	1 50
Travel for service at 6 cts. one way, each subpœna, . .	4 80
Clerk's fees:	
Filing *narr*, 10 cts.; entering rule to plead, 15 cts., .	25
Copying rule to plead, 10 cts.; certificate and seal, 35 cts.,	45

Copying rule on appearance of defendant, 10 cts.; certificate and seal, 35 cts.,	45
Copying pleas or papers if ordered, at 10 cts. per folio, and certified,	3 10
Oaths to witnesses on trial, at 10 cts. each,	60
Filing papers at 10 cts.; each order at 15 cts.,	2 10
Making dockets and indexes, and taxing costs,	3 00
Issuing execution,	1 00
Aggregate,	$

Taxed at $ this day of , 18 .

, Clerk.

FORM No. 107.

Execution.

The President of the United States of America to the marshal of the district of New York, *Greeting:*

We command you that of the goods and chattels of , in your district, you cause to be made $, the amount of a certain judgment which , plaintiff lately in the circuit court of the United States of America, in the second circuit for the district of New York, recovered against , [L. S.] and which in the said court were adjudged to the said plaintiff for [damages or debt] which he had sustained, as well as for $, costs and charges by him about said suit in that behalf expended; whereof the said defendant is convicted, as appears to us of record.

And if sufficient goods and chattels of the said defendant, , cannot be found in your district, then we command you that you cause the [damages or debt] aforesaid to be made of the lands and tenements and real estate whereof the said , defendant, was seized, on the day of , in the year of our Lord one thousand eight hundred and , or at any time afterwards, in whose hands soever the same may be; and have you that money before the judges of the said court, at the , on the day of , 18 , to render to the said plaintiff for

[damages or debt] aforesaid. And have you then and there this writ.

Witness the honorable , Chief Justice of the Supreme Court of the United States, at the , in the said district, the day of , in the year of our Lord one thousand eight hundred and , in the year of the independence of the United States of America.

, Clerk.

, Attorney.

FORM NO. 108.

Taxed costs, non pros.

United States circuit court, district of .

A. B. }
v. }
C. D. }

Bill of costs on judgment of *non pros* (in case removed or otherwise).

Attorney's fees.

Before issue, ...	$10 00
Disbursements, ...	

Marshal's fees.

Serving certiorari at $2 per defendant, ...	$
Travel to place of return at 6 cts., ...	

Clerk's fees.

Filing petition, 10 cts., and entering rule for certiorari, 15 cts., ...	25
Copy rule, 10 cts.; certificate and seal, 35 cts., . .	45
Issuing certiorari in duplicate on removal from state court at $1 each, ...	2 00
Filing certiorari and entering return; and filing precept and entering rule on appearance, ...	50
Certified copy, 45 cts.; entering rule for pleading *de novo*, 15 cts., ...	60
Copy certified, 45 cts.; filing papers at 10 cts., $; rule for judgment, 15 cts., ...	
Copy rule certified, 45 cts.; final fee for making dockets, indexes, etc., $1, ...	1 45

Making judgment record, folios at 15 cts., . .
Issuing execution, $1; filing execution and entering return, 25 cts., ... 1 25

$

FORM NO. 109.

Taxed costs, default, etc.

United States circuit court, district of .

A. B. }
v. }
C. D. }

Plaintiff's costs on default, writ of inquiry and judgment.

Attorney's fees.

Before issue, ... $10 00
Disbursements, ...

Marshal's fees.

Executing writ of inquiry, ... 5 00
Serving writ (or capias if any), ... 2 00
Travel at 6 cts. per mile, miles, ...

Clerk's fees.

Filing declaration, 10 cts.; entering rule to plead, 15 cts.; copy rule, 10 cts.; certificate and seal, 35 cts., 70
Entering default, 15 cts.; copy rule on default, 10 cts.; certificate and seal, 35 cts., ... 60
Clerk attending on inquiry one day, ... 5 00
Issuing writ of inquiry, $1, ... 1 00
Making dockets, indexes, etc., ... 1 00
Making judgment record, folios at 15 cts., . .
Issuing execution, ... 1 00
Issuing writ of possession (if done), ... 1 00
Filing and entering return of execution, . . . 25
(Filing and entering return of writ of possession), . . 25

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FORMS IN ADMIRALTY.

FORM No. 110.

Libel for salvage.

District Court of the United States for the Southern District of New York.

Peter Hart et al., libellants,
v.
The Ship Waverly.
} In admiralty.

To the honorable Samuel B. Stevens, judge of the district court of the United States in and for the southern district of New York.

The libel of Peter Hart, owner of the American brig the Alaska, of New York, and of R. W. Fielding, master of the said brig, for themselves and all others entitled, against the ship Waverly, her tackle, apparel, furniture and cargo, and against all persons intervening for their interests therein in a cause of salvage, civil and maritime, alleges as follows:

First. That on the twenty-seventh day of August last past, the said R. W. Fielding being on a voyage in the said brig the Alaska, from Havana, in the island of Cuba, to Cadiz, in Spain, discovered a ship dismasted and apparently deserted, whereupon he hauled up for and boarded her; that he found the said ship, which proved to be the British ship Waverly, of London, with twelve feet of water in her hold, totally dismasted and entirely abandoned by her captain and crew; that he found no papers on board the said ship, but she had a full cargo of rum, sugar and other West India produce on board.

Second. That the said R. W. Fielding thereupon took the said ship Waverly in tow and made for the port of New York, where he arrived with the said ship on the twelfth day of September, instant, the crew of the brig being almost worn out with fatigue in pumping out the said ship and other work done on board of her, and they are entitled to a reasonable share of said ship and cargo for the salvage thereof.

Third. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libellants pray that process in due form of law, according to the course of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said ship Waverly, her tackle, apparel, furniture and cargo, and that all persons claiming any interest therein may be cited to appear and answer upon oath all and singular the matters aforesaid, and that this honorable court will be pleased to decree to the libellants a reasonable and proper salvage, in proportion to the value of said vessel and cargo, and that the said ship, her tackle, apparel, furniture and cargo, may be condemned and sold to pay said salvage, with costs, charges and expenses, and that the libellants may have such other and further relief in the premises as in law and justice they may be entitled to receive.

Peter Hart.
R. W. Fielding.

Sworn to September 16, 1829, before me.

Fred. F. Rich, Clerk of district court.

Edward E. DeForest, Proctor.
A. E. McGorrish, Advocate.

FORM No. 111.

Stipulation for costs to be given by the libellants on filing the foregoing libel.

District Court of the United States for the Southern District of New York.

Peter Hart et al., libellants,
v.
The Ship Waverly. } In admiralty.

Whereas a libel was filed in this court on the 16th day of September, 1829, by Peter Hart and R. W. Fielding, against the ship Waverly, her tackle, apparel, furniture and cargo, for the reasons and causes in the said libel mentioned, and praying that the same may be condemned and sold to answer the prayer of the libellants; and the said libellants and William Thompson, surety and parties

hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libellants or their surety, execution may issue against their goods, chattels and lands for the sum of two hundred and fifty dollars.

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be and are bound in the sum of two hundred and fifty dollars, conditioned that the libellants above named shall pay all such costs as shall be awarded against them by this court.

Peter Hart.
R. W. Fielding.
William Thompson.

Taken and acknowledged this 16th day of September, 1829, before me.

Fred. F. Rich, Clerk.

FORM No. 112.

Attachment and monition against a ship and cargo in rem, on the foregoing libel.

Peter Hart et al., libellants,
v.
The Ship Waverly. } In admiralty.

The President of the United States of America to the marshal of the southern district of New York, *Greeting:*

Whereas a libel hath been filed in the district court of the United States for the southern district of New York, on the 16th day of September, in the year of our Lord eighteen hundred and twenty-nine, by Peter Hart and others, against the ship Waverly, her tackle, apparel and furniture, and cargo, in a cause of salvage, civil and maritime, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said ship or vessel, her tackle, etc., and cargo, may show cause why the same should not, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant:

You are, therefore, hereby commanded to attach the said vessel or ship, her tackle, etc., and cargo, and to detain the same in your

custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the southern district of New York, on the first Tuesday of October next, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness the honorable Samuel B. Stevens, judge of the said court, at the city of New York, in the southern district of New York, this 16th day of September, in the year of our Lord eighteen hundred and twenty-nine, and of our independence the fifty-sixth.

Fred. F. Rich, Clerk.

Edward E. De Forest, Proctor for libellants.

Form No. 113.

Claim by the agents of foreign underwriters to vessel and cargo in case of salvage of a foreign ship.

United States District Court for the Southern District of New York.

Peter Hart et al.
v.
The Ship Waverly. } In admiralty.

To the honorable , judge of the district court of the United States for the southern district of New York.

The answer and claim of H. R. Clay and G. W. Clay, of the city of New York, merchants, intervening for the interests of their principals, to the libel of Peter Hart and R. W. Fielding, alleges as follows:

First. That these defendants admit that on the twenty-seventh day of August last past, the said R. W. Fielding was the master of the brig Alaska, of New York, and that he was then in the said ship

on a voyage from Havana, in Cuba, to Cadiz, in Spain; but whether he then discovered a ship dismantled and apparently deserted, and whether he then hauled up for her and boarded her, and whether he found the said ship with twelve feet of water in her hold, and totally dismantled and entirely abandoned by her captain and crew, and whether the said ship proved to be the British ship Waverly, of London, and whether the said R. W. Fielding found any papers in the said ship or not, these respondents know not, and therefore can neither admit nor deny, but leave the same to be proved by the said libellant.

Second. That they admit it to be true that the said R. W. Fielding arrived at the port of New York on the twelfth day of September, in the year of our Lord eighteen hundred and twenty-nine, and that he had the ship Waverly, of London, in tow, and that the said ship had a full cargo of rum, sugar and other West India produce on board, and that said ship, when so brought in, was dismantled and disabled; but whether the crew of the said brig Alaska were or were not almost worn out with fatigue in pumping out the said ship, and with other work done on board of her, these respondents know not, and, therefore, leave the same to be proved by the said libellants.

Third. That by a commission dated the second day of July, in the year of our Lord eighteen hundred and seventeen, signed by James Fordy, chairman, and William Bedford, junior, secretary of the committee for managing the offices of the underwriters, at Wright's, in London, in that part of the United Kingdom of Great Britain and Ireland called England, these respondents were appointed to act as agents for the subscribers at Wright's, at the port of New York, and custom-house district, subject to the instructions in the said commission mentioned; and that by the said instructions they are, amongst other things, directed, "when salvage or remuneration is claimed for assistance rendered to vessels, to attend the meeting of the commissioners, magistrates or other persons legally authorized to determine the amount, in order to rebut any exaggerated statements on the part of the salvors, by the evidence of the master and crew;" and they are likewise authorized and empowered by the said commission to attend to the interests of the subscribers at Wright's in general; as by the said commission now in the possession of these respondents will more fully and at large

appear, and to which, for greater certainty, these respondents pray leave to refer.

Fourth. That they are likewise the agents for the underwriters at Liverpool, in that part of the United Kingdom of Great Britain and Ireland called England, and for the underwriters in Glasgow, in that part of the United Kingdom of Great Britain and Ireland called Scotland, under two several commissions of the same date and with the like authority and instructions as mentioned in the said commission from the underwriters at Wright's, in London, now in the possession of these respondents, as by reference thereto had will more fully and at large appear, and to which, for greater certainty, these respondents pray leave to refer.

Fifth. That they have no doubt that the ship Waverly or her cargo, or both, or some part thereof, were or was insured at some or one of the said places, by some or all of the underwriters therein, and they have no doubt but that the said vessel or her cargo, or both, or some part thereof, have or hath been abandoned by the persons interested therein, to the said underwriters, or some or one of them; but these respondents cannot speak on this point with absolute certainty, but only to the best of their belief, inasmuch as a sufficient time has not elapsed since the twelfth day of September, eighteen hundred and twenty-nine, when the said ship was as aforesaid brought into the said port of New York, to communicate the said circumstances to the said several insurers or any of them, and to hear from the said several underwriters, or any of them, on the same subject.

Sixth. That immediately after the said vessel and her cargo were brought into the said port of New York as aforesaid, they wrote to the said underwriters in London, informing them of the circumstances of the case, as far as was known to these respondents, and requesting information from the said underwriters, of their rights and interest in and to the said vessel and her cargo, or any part thereof. That on the sixteenth day of September, in the year of our Lord 1829, these respondents received from , esquire, marshal of the United States for this district, a request that these respondents would enter the cargo of the said ship at the custom-house at New York, and would become responsible for the payment of the duties that might be payable to the United States on the cargo of the said ship. That, in pursuance thereof, these respond-

cnts entered the said cargo, and secured the duties upon the same by bond, conditioned for the payment of the duties to be ascertained on the said cargo. That said duties have been since ascertained, and amount to twenty-one thousand six hundred and ninety-eight dollars and ninety-one cents, which these respondents have hereby become liable to pay; also, certain foreign duties chargeable on said ship and cargo, besides custom-house fees and expenses paid by these respondents; and that this honorable court, after hearing proof and decreeing a reasonable salvage, should it seem proper so to do, may further decree that the rest, residue and remainder of the said ship and her cargo, or of the proceeds thereof should the same be decreed to be sold, after payment of said amount of dues and fees, and of the salvage, may be retained in the custody of this honorable court, for such reasonable time as may seem proper; wherein the rights and interests of the above-mentioned underwriters may be ascertained; and that this honorable court may further decree that the said ship and cargo, or the proceeds thereof, or a part thereof, as proof may be made of interest, may be delivered up to these respondents, upon due proof being made in manner and form as this honorable court may direct, that the said underwriters or any of them have an interest in and a right to receive the same or any part thereof.

G. W. Clay.

Sworn to this fifth day of October, 1829, before me.

J. P. Rich, Clerk.

Ayers & Sewell, Proctors.
Adam Swinton, Advocate.

FORM NO. 114.

Stipulation for costs to be given by the claimant on putting in a claim.

District Court of the United States for the Southern District of New York.

Peter Hart et al.
v.
The Ship Waverly. } In admiralty.

Whereas a libel was filed in this court on the sixteenth day of September, in the year of our Lord one thousand eight hundred

and twenty-nine, by Peter Hart and R. W. Fielding, against the ship Waverly, her tackle, apparel and furniture, and cargo, for the reasons and causes in the said libel mentioned, and praying that the same may be condemned and sold to answer the prayer of the said libellants.

And whereas, also, a claim has been filed in said cause by H. R. Clay and G. W. Clay, and the said claimants and George Calvin, surety, the parties thereto, hereby consenting that in case of default or contumacy on the part of the claimants or their surety, execution for the sum of two hundred and fifty dollars may issue against their goods, chattels and lands:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be and are hereby bound in the sum of two hundred and fifty dollars, conditioned that the claimants above named shall pay all costs and expenses which shall be awarded against them by the final decree of this court, or upon an appeal by the appellate court.

H. R. Clay.
G. W. Clay.
George Calvin.

Taken and acknowledged this 5th day of October, 1829, before me.

J. P. Rich, Clerk.

Form No. 115.

Order of the court on the return of mesne process in rem.

[Title of cause as in Form No. 114.]

The marshal having returned upon the monition in this cause that he had attached the said ship, her tackle, etc., and cargo, and had given due notice to all persons claiming the same that this court would on this day proceed to the trial and condemnation thereof, should no claim be interposed for the same:

On motion of Mr. Thompson, proctor for the libellants, proclamation was made for all persons having anything to say why the said vessel and her cargo should not be condemned and sold to answer the prayer of the libellants to appear; and on like motion, ordered that the defaults of all persons who have not already filed their claims be entered.

Form No. 116.

Proclamation on the return of process in rem.

[Title of cause as in Form No. 114.]

Hear ye! Hear ye! Peter Hart and R. W. Fielding, against the ship Waverly, her tackle, apparel and furniture, and cargo. All persons who have anything to say why the ship Waverly, her tackle, apparel and furniture, and cargo, should not be condemned and sold to answer the prayer of the libellants in this cause, come forward and make your allegations in that behalf.

Form No. 117.

Replication to claim and answer.

[Title as in Form No. 114.]

In Admiralty.

To the honorable , judges, etc.

The replication of Peter Hart and R. W. Fielding, libellants, to the claim and answer of James Williamson, claimant and respondent, alleges that they will aver, maintain and prove their libel to be true, certain and sufficient, and that the said claim and answer of the said claimant and respondent is uncertain, untrue and insufficient; and they humbly pray as in and by their libel they have already prayed.

G. F., Proctor for libellants.

Form No. 118.

Claim by the United States Attorney on behalf of the United States for forfeiture and for duties in a case of salvage of a foreign ship and cargo.

[Title as in Form No. 114.]

In Admiralty.

To the honorable A. B., judge of the district court of the United States for the southern district of New York.

The claim of Richard F. Stowe, district attorney of the United States of America for the southern district of New York, inter-

vening for the interest of the said United States in the said ship called the Waverly, and her cargo, and the answer of the said attorney, on behalf of the said United States, to the libel of the said Peter Hart and R. W. Fielding. alleges as follows:

First. That the said Richard F. Stowe, district attorney of the United States of America for the southern district of New York, claims the said ship Waverly, together with the cargo of the said ship laden on board of her, as stated and set forth in the said libel, as forfeited to the use of the United States, for the cause following, to wit: that the said ship Waverly is a ship or vessel owned wholly or in part by a subject or subjects of his Britannic Majesty, and said ship or vessel, after the thirtieth day of September, one thousand eight hundred and eighteen, did come and arrive from a port or place in a colony or territory of his Britannic Majesty, to wit, from the port of Armotto Bay, in the island of Jamaica, in the West Indies, which said port is and was, at the time the said ship sailed from thence, by the ordinary laws of navigation and trade closed against vessels owned by citizens of the United States, and that the ports of the United States were and are closed against the said ship or vessel called the Waverly, which said ship or vessel being so excluded from the ports of the United States, did enter the same, to wit, the port of New York, in the southern district of New York aforesaid, in violation of the acts of Congress of the United States in such case made and provided. By force and virtue of the acts in such case made and provided, the said ship or vessel, her tackle, apparel and furniture, together with the cargo on board of the said ship or vessel, became and are forfeited to the use of the said United States.

Second. That if this honorable court shall adjudge and decree that the said ship or vessel with her cargo, or either, is not forfeited to the use of the United States, for the cause aforesaid, the said ship or vessel, together with the cargo on board of her, is liable to the payment of the duties imposed by the laws of the United States on the arrival of the said ship or vessel within the United States, and on the importation of the cargo of merchandise on board of her, to wit, rum and sugar of the growth, produce and manufacture of some foreign country, and which are subject to the payment of duties to the United States, on being brought or imported into the United States; wherefore the said attorney, on behalf of the said

United States, prays this honorable court to decree the payment of the said duties to the United States according to law, if the said ship and the cargo on board of her as aforesaid shall be adjudged not to be forfeited to the use of the said United States, for the cause aforesaid, and that he may have his costs, etc. And the said attorney further insists upon and submits to this honorable court the rights and interest of the said United States of America in the premises, whatever they may be, to be decreed to them.

Richard F. Stowe,
Attorney United States, etc.[1]

Form No. 119.

Libel for mariners' wages.

To the honorable James Madison, judge of the district court of the United States within and for the district of Massachusetts.

The libel and complaint of A. B., of , late mariner of the ship , whereof C. D. now is or late was master, against the said ship, her tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein in a cause of subtraction of wages, civil and maritime. And thereupon the said A. B. alleges and articulately propounds as follows:

First. That in the month of , in the year of our Lord eighteen hundred and , the said ship , whereof the said C. D. was master, being at the port of , and destined on a voyage from thence to , he, the said C. D., by himself or his agent, on the high seas and within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States and of this honorable court, did ship and hire the libellant to serve as a mariner on board the said ship for and during said voyage at the rate of wages of per month, as schedule rate; and that for the due performance of the said voyage the libellant signed and duly executed certain articles of agreement, commonly called the shipping or mariner's articles, which now are in the possession of the said C. D., master [or owner] of the said ship, and which he prays may be produced for further certainty in the premises and for the benefit of the libellant. That in pursuance thereof, on or about the day of , he, the

[1] The United States do not give a stipulation for costs.

libellant, went on board and entered into the service of the said ship as such mariner, as aforesaid.

Second. That the said ship, having taken on board a cargo of divers goods and merchandise for the voyage, proceeded therewith and with the libellant on board for the port of , and there safely arrived on or about , and delivered her cargo and made freight, and that the libellant continued on board and in the service of the said ship until the day of , when the said voyage for which he had so engaged was duly ended, and he was discharged from such service by the said C. D., the master.

Third. That during the whole time he was in the service of the said ship, to wit, from the time when he went on board thereof to the time of his discharge therefrom, as aforesaid, he well and truly performed his duty as a mariner on board the said ship to the best of his ability, and was obedient to all the lawful commands of the said master and the other officers of the said ship, and well and truly deserves and is entitled to the wages in the schedule hereunto annexed, amounting to the sum of .

Fourth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court, in verification whereof, if denied, the libellant craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

Wherefore the libellant prays that process in due form of law, according to the course of courts of admiralty and of this honorable court in causes of admiralty and maritime jurisdiction, may issue against the said ship, her tackle, apparel and furniture, wheresoever the same shall be found, and that all persons having or pretending to have any right, title or interest therein may be cited to appear and to answer upon oath all and singular the matters so articulately propounded; and that this honorable court would be pleased to pronounce for the wages aforesaid, and such other relief to the libellant as shall to law and justice appertain, and also to condemn the said ship, her tackle, apparel and furniture, and the party intervening therefor in costs.

[Signed] A. B., Libellant.

E. F., Proctor.

Massachusetts District, *ss:* , 18 .

Sworn to by the libellant before me.

G. H., Clerk.

SCHEDULE ANNEXED.

Wages due A. B. from , to , being
months days, at the rate of
per month, ... $
Out of which he has received, including hospital dues, .

Sum due, ... $

FORM NO. 120.

Libel in a cause of personal damage.

Timothy Billings
v.
The Ship Oneida.

To the honorable James Madison, judge of the district court of the United States within and for the district of Massachusetts.

The libel and complaint of Timothy Billings, of Boston, in the district aforesaid, late a mariner on board the ship Oneida, whereof Thomas Moore, of the said Boston, now is or late was master, against the said Thomas Moore, in a cause of damage, civil and maritime. And thereupon the said Timothy Billings alleges and articulately propounds as follows:

First. That in April, 1823, the ship Oneida, whereof the said Thomas Moore was then master, being in the port of Boston and bound on a voyage to China, the said Thomas Moore did, on the high seas, and within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of this honorable court, by himself or his agent, ship and hire the libellant to serve as a seaman on board of the said ship for and during the said voyage; and the said ship, having taken on board her complement of officers and crew, did, on or about the day of the said month of April, proceed thereon, with the libellant on board, and, having been to China, returned to the port of Boston aforesaid, with a full ship, in the month of June last.

Second. That during the whole time the libellant continued on board the said ship, he did well and truly perform his duty on board her, and was obedient to all the lawful commands of the said

Thomas Moore, the master, and others his superior officers on board the said ship.

Third. That during the time of the said voyage, and while the ship was lying off Wampoa, in China, to wit, on the high seas, and within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of this honorable court, on the 15th day of October, 1823, whilst the libellant was in the fore-hold handing up billet wood, Charles Hawkins, the third officer on board the said ship or vessel, charged him with not working so hard as he could, nor so fast as another seaman of the name of William Calvert; that the libellant replied "that William Calvert worked too fast to last long," or he made use of words to that or the like effect; when the said Charles Hawkins immediately made complaint to Mr. Jamison, the chief officer, that the libellant had been very impertinent to him; whereupon, and for no other cause whatever, Mr. Jamison then ordered him to be taken from his duty and placed below in irons, where he continued until the 21st of October. That, upon the said Thomas Moore coming on board the ship (from which he had been absent the whole of the above-mentioned period), he immediately, upon complaint being made to him by the said Jamison, and without hearing the libellant in his defence, ordered him to the gangway and caused him to be flogged with three dozen lashes; and although the libellant most humbly and repeatedly urged the said Thomas Moore for some water to allay his thirst and fever that he then suffered from the punishment and previous imprisonment, he, the said Thomas Moore, absolutely refused to let the steward give him any, nor would he permit the mate to give the libellant an ointment or lotion to apply to his back, but ordered him in his fainting and exhausted state to return to his duty; that the libellant, in consequence of the flogging aforesaid, suffered extreme pain and was greatly injured thereby.

Fourth. That the libellant, by reason of the said cruel and violent assault which he suffered by the act of the said Thomas Moore as aforesaid, has sustained damage to the amount of one thousand dollars.

Fifth. That all and singular the premises are true, and within the admiralty jurisdiction of this honorable court; in verification whereof, if denied, the libellant craves leave to refer to depositions and other proofs to be by him exhibited in this cause.

Wherefore he prays that process in due form of law, according to the course of admiralty and maritime jurisdiction, may issue against the said Thomas Moore, and that he may be required to answer upon oath all and singular the matters so articulately propounded, and that this honorable court would be pleased to pronounce for the damages aforesaid, and such other relief to the libellant as shall to law and justice appertain, and also to condemn the said Thomas Moore in costs.

Timothy Billings, Libellant.

G. F., Proctor.

Form No. 121.

Libel in personam on contract.

To the honorable A. B., judge of the district court of the United States in and for the district of . .

The libel of C. D., of , merchant, against E. F., of the city of , merchant, owner of the ship Waverly, in a contract [or of tort, as the case may be], civil and maritime, alleges as follows [here set forth the grounds or causes of the action, as in the foregoing forms of libel in *rem*, including an averment of the jurisdiction of the court, and conclude as follows]:

Wherefore the libellant prays that process in due form of law, according to the practice of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said E. F., and that he may be cited to appear and answer upon oath all and singular the matters aforesaid, and that this honorable court would be pleased to decree the payment of the damages aforesaid [or as the case may require, such as the amount which shall be due for building the vessel], with interest and costs, and to give him such other and further relief as in law and justice he may be entitled to receive.

C. D.

G. F., Proctor for libellant.[1]

[Sworn to as in the foregoing forms.]

[1] If the proceedings are both in *rem* and in *personam*, the above forms can be used, with the changes which will be suggested by the proceeding.

Form No. 122.

Claim and Answer.

United States of America,
Massachusetts District, *ss:*

T. B., libellant,
v.
The Ship Oneida.

term, 18 .

To the honorable James Madison, judge of the district court of the United States within and for the district of Massachusetts.

And now T. M., of , intervening for his interest in the ship Oneida, appears before this honorable court, and for answer to the libel and complaint of T. B., of , against the said ship, and against all persons lawfully intervening for their interest therein, alleges and articulately propounds as follows:

First. That the respondent now is the owner of the said ship Oneida, and also was the owner of the same during the time the said T. B. belonged thereto, and that the said T. B. was duly hired to serve on board the said ship for the voyage, as in the first article in said libel is propounded; the articles of agreement for which voyage, signed by the said T. B., the respondent doth herewith produce in court, according to the prayer in the said first article.

Second. That the said ship Oneida, having taken on board a cargo of divers goods and merchandise for the voyage, proceeded therewith for the port of Wampoa, in China, and there safely arrived and delivered her cargo and made freight, as in the third article in the said libel is propounded.

Third. That whilst the said ship Oneida was at the port of Wampoa, the said T. B., etc. [here state the bad conduct of the libellant, amounting to mutiny or desertion, or other ground of forfeiture of wages, and such other matters showing that the shipping articles were substantially broken, and also any other matters calculated to support and establish the defence].

Fourth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable court; in verification whereof, if denied, the respondent prays leave to refer to the depositions and other proofs to be by him exhibited in this cause.

Wherefore the respondent prays that this honorable court would

be pleased to pronounce against the libel aforesaid, and to condemn the libellant in costs, and otherwise right and justice to administer in the premises. [Signed] T. M.

I. J., Proctor.

District of Massachusetts, *ss:*

Sworn to by the respondent before me, , 18 .

G. H., Clerk.

FORM No. 123.

Citation, with attachment of goods, etc.

UNITED STATES, }
DISTRICT OF . } *sct.*

The President of the United States of America to the marshal of the district of , *Greeting:*

Whereas a libel has been filed in the district court of the United States for the district of , on the day of , A. D. 18 , by , against , in a certain action, civil and maritime, for therein alleged to be due the said libellant, amounting to , and praying that a citation may issue against the said defendant, pursuant to the rules and practice of this court:

Now therefore, we hereby command you that you cite and admonish the said defendant, if he shall be found in your district, that he be and appear before the said district court on Friday, the day of , at ten o'clock in the forenoon of said day, then and there to answer the said libel, and to make allegations in that behalf; and if the said defendant cannot be found in your district, that you attach his goods and chattels in your district to the amount sued for; and if sufficient goods and chattels cannot be found, that you attach his credits and effects to the amount sued for in the hands of the garnishee, , and that you summon the said garnishee to appear before the said district court, on the said day of , at ten o'clock in the forenoon of the said day, to do and abide what may be required of in this behalf. And have you then there this writ.

Witness the honorable , judge of said court at , this day of , A. D. 18 , and in the one hundred and year of the independence of the said United States.

, Clerk district court.

Form No. 124.

Citation.

United States, district of . } *sct.*

The President of the United States of America to the marshal of the district of , *Greeting:*

Whereas a libel has been filed in the district court of the United States in and for the district of , on the day of , A. D. 18 , by , in a certain action, civil and maritime, for , therein alleged to be due the said libellant, amounting to , and praying that a citation may issue against the said defendant, pursuant to the rules and practice of this court.

Now therefore, you are hereby commanded to cite and admonish the said defendant, if he shall be found in your district, that he be and appear before the said district court, on Friday, the day of , at ten o'clock in the forenoon of said day, then and there to answer the said libel and to make allegations in that behalf. And have you then there this writ.

Witness the honorable , judge of said court at , this day of , A. D. 18 , and in the one hundred and year of the independence of the said United States.

, Clerk district court.

Form No. 125.

Claim.

In the district court of the United States in and for the district of .

A. B. *v.* The Ship Lena, her tackle, apparel and furniture. } Plea civil and maritime for In admiralty.

And now, E. F., intervening for the interest of C. D., appears before the honorable court and makes claim to the said the ship Lena, her tackle, apparel and furniture, as the same are attached by the marshal, under process of this court, at the instance of A.

B., and the said E. F. avers that he was in possession of the said the ship Lena at the time of the attachment thereof, and that the person above named was the true and bona fide owner of the said ship Lena, and that no other person is the owner thereof; and that the said E. F. is master of the said ship Lena and the true and lawful bailee thereof for the said owner; wherefore, he prays to be admitted to defend accordingly.

E. F.

and subscribed in open court, this day of , A. D. 18 .

, Clerk district court United States.

FORM No. 126.

Claim.

In the district court of the United States for the district of .

The United States	Sur information for forfeiture.
v.	
The Ship Lena and her tackle, furniture and apparel, lately in possession of A. B.	In admiralty.

And now, this day of , A. D. 18 , A. B. appears in open court and makes claim to the ship Lena and her tackle, furniture and apparel, as the same are attached by the marshal, under the process of this court, at the instance of the United States, libellants for forfeiture; and the said A. B. avers that he was in possession of the above-mentioned property at the time of the attachment thereof, that he is the true and bona fide owner of the same, and that no other person is the owner thereof, and that all and singular the averments of cause of forfeiture alleged in the information filed in the above case are untrue; wherefore he prays to be admitted to defend accordingly.

and subscribed in open court, this day of , A. D. 18 .

, Clerk district court United States.

Form No. 127.

Stipulation.

United States, } ss: In admiralty.
district of . }

On this day of A. D. 18 , and in the year of the independence of the said United States, in open district court of the United States, personally appeared , and by stipulation in due course of law acknowledged to be indebted to the United States of America, for the use of all persons who may be interested in the premises, in the sum of dollars, to be levied of goods and chattels, lands and tenements,

On condition that if the libellant in the above action shall pay all costs which by the decree, mandate or practice of the court may become liable to pay, then this stipulation to be void and of no effect; otherwise to be and remain in full force and virtue, and execution to issue thereon forthwith for the amount of such costs, at the instance of any person interested as aforesaid.

Taken, acknowledged and subscribed this day of , A. D. 18 , in open court. [L. S.]

, Clerk D. C.

Form No. 128.

Stipulation by claimant in proceedings for forfeiture.

In the district court of the United States for the district of .

The United States } Information for forfeiture.
v. }
, }
late in possession } No. day of , 18 .
of . }

Be it remembered that on this day of , Anno Domini 18 , we, , acknowledge ourselves to be jointly and severally indebted to the United States of America in the sum of lawful money of the United States, to be levied of the goods and chattels, lands and tenements of us, and each of us, to the use of the United States.

Upon this condition, that whereas, under proceedings upon a libel of information in the district court of the United States for the eastern district of for alleged forfeiture, the marshal of the said district has in custody certain goods, chattels and effects which, as the same are specified in a certain claim thereof by the said in the said court, have been duly appraised at the value of the sum aforesaid; and the said claimant having prayed and been allowed restoration of the said subjects of the said claim upon our entering into this recognizance.

Now, if the said claimant shall abide the final order, decree and judgment of the said court, and upon condemnation of the subjects of the said claim, or any of them, as forfeited, shall forthwith pay into the said court, or as the said court may direct, the sum aforesaid, or the full appraised value aforesaid of all and whatsoever shall have been so condemned, then this recognizance to be void; otherwise it shall remain in full force. And whenever the said sum, or any part thereof, shall be due and unpaid, judgment or judgments against us, or any of us, may, on motion or otherwise, be entered on this recognizance at the suit of the United States (with or without any such previous writ or writs of scire facias as hereinafter mentioned); and execution or executions may forthwith, or at any time or times, issue thereon. And it shall and may be lawful for the United States, by their attorney or proper law officer, whenever the said sum or any part thereof shall be due, and either before or after the entering of any such judgment or judgments as aforesaid, to obtain from this court a writ or writs of scire facias upon this recognizance against us, or any of us, tested as of any day or term present or past, and returnable forthwith, to which writ or writs respectively the judgment or judgments, if already entered, shall relate. And any attorney or attorneys of this court may for us, or any of us, appear to any such writ or writs, and may confess judgment that the plaintiffs have execution as herein demanded, or may, in the names or name of us, or any of us, approve, ratify and confirm any such judgment or judgments, execution or executions, as may previously have been entered or issued. For all which this will be sufficient warrant of us, or any and each of us, with release of all errors, etc.

Taken, acknowledged, sealed and subscribed in [L. S.]
open court.

Form No. 129.

Stipulation by claimant in case of libel by the United States.

Know all men by these presents, that we, , are jointly and severally held and firmly bound to the United States, in the sum of lawful money of the United States, to be paid to the said United States; for payment whereof, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated at , this day of , one thousand eight hundred and eighty .

The condition of this obligation is such that whereas a libel is now pending in the district court of the United States in and for the district of Pennsylvania, at the suit of the United States against , and other property therein mentioned and described , whereof the said , the claimant .

Now if the said , the claimant as aforesaid, shall defend the prosecution of said claim, and respond the costs in case shall not support the same, then this obligation shall be void; otherwise it shall be and remain in full force.

Sealed and delivered in open court, in the presence of

[L. S.]

Form No. 130.

Stipulation for restitution of property attached.

UNITED STATES, DISTRICT OF . } *ss:* In admiralty.

Be it remembered, that at a special district court of the United States, holden at , in and for the district of , on the day of , A. D. 18 , and in the year of the independence of the said United States, before the honorable , judge of said court, come , who, freely and voluntarily submitting to the jurisdiction of the said court, acknowledge to be indebted unto in the sum of dollars, lawful money of the United States, to be levied of the goods and chattels, land and tenements to the use of the said .

Upon condition that whereas a suit is now pending in the said court, for , wherein the said , the libellant against the , and the said , claimant. Now if the shall well and truly abide by all orders, interlocutory or final, of the said court, and of any appellate court in which the said suit may hereafter be depending, and shall fulfill and perform the judgment and decree which may be rendered in the premises, and also pay all such costs and charges as shall be ordered and adjudged to be paid on part, then this stipulation shall be void: otherwise in force, and execution may issue by virtue thereof at one and the same time against any or all the parties to this stipulation.

Taken, acknowledged and subscribed in open court on the day and year above written.

[L. S.]

The above named , being duly , deposes and says that he is permanently a householder within this district, and that he is worth the sum of dollars, after payment of his just debts and liabilities.

And thereupon it is ordered that a writ of restitution issue to the marshal, directing him to restore the said to the said claimant, upon payment to him of his costs and the necessary expenses by him incurred.

Form No. 131.

Attachment in personam.

UNITED STATES, DISTRICT OF . } *sct.*

The President of the United States of America to the marshal of the district of , *Greeting:*

Whereas a libel has been filed in the district court of the United States for the district of , on the day of , by against , in a certain action civil and maritime, for therein alleged to have been committed the said libellant . And whereas, by the mandate of the honorable , judge of the said court, process of attachment has been awarded against the said :

Now, therefore, we do hereby command you that you attach the

said , if shall be found in your district, and safely keep, so that you may have before the judge of the said court, at a session of the same court to be holden at , on the day of , to answer the said libel, and to make allegations in that behalf. And have you then there this writ.

Witness the honorable , judge of the said court at Philadelphia, this day of A. D. 18 , and in the year of the independence of the said United States.

, Clerk district court U. S.

Form No. 132.

Writ of appraisement.

UNITED STATES, DISTRICT OF . } *ss:* In admiralty.

, judge of the district court of the United States for the district of .

To . You are hereby commanded, in the name and by the authority of the United States, that , now in the custody of the marshal and libelled for forfeiture at the suit of the United States of America, you well and faithfully value and appraise; an indenture containing the true value thereof, under your hands, and upon your respective oaths or affirmations, you make and return to me forthwith, at a session of this court now holding at the district court room in the city of , together with this writ.

Given under my hand and the seal of the said court at , this day of , A. D. 18 , and in the one hundred and year of the independence of the said United States.

, Clerk district court U. S.

, the subscriber , having been appointed appraiser to appraise the property named in this writ, do that will faithfully and fairly appraise the same, and make a true report of the value thereof, according to the best of understanding, without unnecessary delay.

and subscribed this day of , A. D. 18 .

FORM NO. 133.

Writ to restore.

UNITED STATES, DISTRICT OF . } *ss:* In admiralty.

, judge of the district court of the United States in and for the district of , to the marshal of the same district, *Greeting:*

You are hereby commanded to deliver and restore unto the or vessel called the , with her tackle, apparel and furniture, or so much thereof as was lately and is now in your custody and possession, by virtue of a writ of attachment lately issued out of said court, at the suit of , libellant for ; and how you shall have executed this writ, make return to me at a special session of said court to be holden at the city of on the day of , A. D. 18 , and have you then there this writ.

Given under the seal of said court at , this day [L. S.] of , A. D. , and in the one hundred and year of the independence of the said United States.

, Clerk district court U. S.

FORM NO. 134.

Return to writ to restore by the marshal.

I have restored to , as by the within writ I was commanded. So answers

E. F., U. S. marshal, district of .

FORM NO. 135.

UNITED STATES, DISTRICT OF . } *ss:*

The President of the United States to the marshal of the district of , *Greeting:*

We command you, that of the goods and chattels, lands and tenements in your district of , late of your district, you cause to be made and levied as well a certain debt of which in the district court of the United States in and for the eastern district of , before the judge of the said

court by the consideration of the same judge lately recovered against the said as the sum of , which to the said , in the said court, was in like manner adjudged for costs and charges which had sustained in a certain plea, civil and maritime. And have you those moneys before the said judge at a session of the same court, to be holden at , on the day of , to render to the said debt and costs and charges aforesaid. And hereof fail not, and bring with you this writ.

Witness the honorable , judge of said court at , this day of A. D. 18 , and in the year of the independence of the United States.

[L. S.]

, Clerk district court United States.

FORM No. 136.

Order for process on libel.

United States district court, district of .

A. B.
v.
The Ship Lena. } In admiralty.

On filing a libel in this cause, and on motion of Mr. J. F., proctor for the libellant, it is ordered that a warrant of arrest and monition be issued herein, returnable the day of , 18 .

FORM No. 137.

Warrant of arrest and monition.

[Title as in Form No. 1.]

In Admiralty.

UNITED STATES OF AMERICA, } *ss:*
DISTRICT OF . }

The President of the United States of America to the marshal of the district of , and to his deputy, whomsoever, *Greeting:*

You are hereby jointly and severally empowered and strictly enjoined and commanded that you arrest the vessel called the ship Lena, whereof J. H. now is or late was master, her boats, tackle,

apparel and furniture, if she shall be found within your district; and the same so arrested you keep under safe and secure arrest until you shall receive further orders from the said court, or the same shall be discharged in due course of law; and that you cite at the premises all persons in general who have, or pretend to have, any right, title or interest therein, to appear before the judge of the district court of the United States of America for the district of , at the city of , on the day of , if it be a court day, or else on the court day next following, at o'clock in the noon, there to answer unto in a cause of A. B. civil and maritime, and further to do and receive in this behalf as to justice shall appertain; and that you duly certify the judge of the aforesaid court what you shall do in the premises, together with these presents.

Witness the honorable , judge of the aforesaid court, at the city of , this day of , in the year of our Lord one thousand eight hundred and .

Action for $500.

G. F., Clerk.
L. M., Proctor.

Marshal's return to the foregoing writ.—In obedience to the within writ, I did on the day of , 18 , arrest the within mentioned the ship Lena, her tackle, etc., and I duly cited all persons to appear as within commanded.

Subsequently having received a bond duly executed and approved, conditioned to abide the decree of the court in this cause, I did release the said vessel, and return the said bond herewith.

Dated the day of , 18 .

O. P., U. S. marshal.
By R. S., Deputy.

Form No. 138.

Bond by a claimant.

[Title as in Form No. 1.]

In Admiralty.

Know all men by these presents, that N. M. and C. L. are held and firmly bound unto A. B. in the sum of dollars, law-

ful money of the United States of America, to be paid to the said A. B., executors, administrators or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, , firmly by these presents. Sealed with our seals.

Dated the day of , one thousand eight hundred and .

Whereas, in a certain cause of civil and maritime, moved and prosecuted in the district court of the United States of America for the district of New York, on behalf of the above-named obligees against the ship or vessel called the ship Lena, her boats, tackle, apparel and furniture, a warrant of arrest has been issued out of the said court against the said ship or vessel, her boats, tackle, apparel and furniture, in virtue of which said warrant the said ship or vessel, her tackle, apparel and furniture have been arrested by , one of the deputies of the marshal of the said district, and are now in his custody:

Now, therefore, the condition of the above obligation is such that if N. M., the claimant of the said ship or vessel, her boats, tackle, apparel and furniture, shall well and truly abide and answer the decree of the said court in the aforesaid cause, without fraud or other delay, then the above obligation to be void; otherwise it shall remain in full force and virtue.

Sealed and delivered in presence of

N. M. [L. S.]
C. L. [L. S.]

STATE OF ,
DISTRICT OF , } *ss:*
County.

I hereby certify, that on this day of , 18 , before me came the above-named N. M. and C. L., to me known to be the same persons described in and who executed the above bond, and acknowledged that had executed the same.

L. M., Clerk.

STATE OF ,
DISTRICT OF , } *ss:*
County.

C. L., of the of , in the said district, being duly sworn, doth depose and say, and each for himself says,

that he is a householder and resident of the said district, and that he is worth dollars, after all his debts and liabilities are paid and satisfied.

Sworn before me, this day of , 18 .

L. M., Clerk.

FORM NO. 139.

Default and order of reference.

United States district court, district of .

A. B.
v. } In admiralty.
The Ship Lena.

The mesne process returnable this day in this cause having been returned duly executed, and upon proclamation duly made for all persons having or pretending to have any right, title or interest in the said the ship Lena, her tackle, apparel and furniture, to appear and make due answer to the libel filed in this cause, no person having appeared to answer the same, the court, on motion of Mr. , advocate for the libellant, doth pronounce all persons whatsoever to be in contumacy and default, and doth order and adjudge that the libel filed in this cause be, and the same hereby is, taken pro confesso against all persons whatsoever; and it is further ordered that it be referred to , esquire, who is hereby appointed a commissioner for the purpose, to take and hear such testimony as the nature of the case may require, and report the same to the court; and also to ascertain and compute the amount due the libellant for principal and interest on account of the mentioned in the said libel, and report thereon with all convenient speed.

FORM NO. 140.

Report on reference.

United States district court, district of .

A. B.
v. } In admiralty.
The Ship Lena.

To the judge of the said court:

In pursuance of an order of this court, made in the above cause, on the day of , by which it was referred to me to

compute and ascertain the amount due the , for principal and interest on account of , mentioned and set forth in the libel in this cause, I, , the commissioner and referee in the said order named, do respectfully certify and report that certain testimony has been taken on the reference herein, which is herewith transmitted to the court. And I do further respectfully report that I have considered the said testimony and have made the necessary computations, and that I have accordingly ascertained the amount due the libellant in this cause as aforesaid; and that the amount due to the libellant as aforesaid, for principal and interest, up to and including the date of this report, is . And I do further certify and report that the schedule hereunto annexed, marked A, and making a part of this my report, contains a statement and account of the principal and interest moneys due to the libellant as aforesaid, the period of computation of interest and its rate, and to which, for greater certainty, I refer.

All of which is respectfully submitted.

Dated

, Commissioner and referee.

[Here insert schedule A, referred to in the foregoing report.]

FORM NO. 141.

Final decree.

United States district court, district of .

A. B.
v.
The Ship Lena. } In admiralty.

This cause coming on to be heard upon the report of , esquire, appointed a commissioner to make report therein, bearing date the day of , certifying that there due to the at the date of said report, for on motion of Mr. , advocate for the libellant, the court doth order, adjudge and decree that the said report and all things therein contained do stand ratified and confirmed; and it is further ordered, adjudged and decreed that the said the ship Lena, her tackle, apparel, boats and furniture, be sold at public auction, according to

the course and practice of the court, and that the proceeds of such sale be brought without delay into the registry of the court; and that the clerk pay to , proctor, out of the said proceeds, the sum hereinbefore mentioned as reported to be due him, with the legal interest thereon from the date of the said report, together with costs and charges in this suit to be taxed, or so much thereof as the said proceeds will pay of the same, after deducting all prior claims and charges thereon.

FORM NO. 142.

Proctor's costs.

United States district court, district of .

A. B.
v.
The Ship Lena. } In admiralty.

Docket fee decree for $50 (or over), ...$
Verification of libel hereof 25 cts., ...
Deposition taken and admitted as evidence, . . .
Witnesses attending 4 days, ...
Witnesses' travel at 5 cts. per mile each, ...

$

UNITED STATES OF AMERICA, DISTRICT OF . } *ss:*

, of the city of , being duly sworn, deposes and says: that the services charged for in the foregoing bill have been actually and necessarily rendered, as therein stated; and that the expenses therein mentioned have been actually and necessarily incurred, as therein set forth.

Subscribed and sworn before me this day of , 18 .

Q. R., Commissioner of the United States.

FORM No. 143.

Clerk's costs; on default and reference.

United States district court, district of .

A. B.
v.
The Ship Lena. } In admiralty.

Filing libel, 10 cts.; entering order for process in minutes, 15 cts.; engrossing, 10 cts.; copy for enrollment, 10 cts., ...	$0 45
Issuing process, $1; seal, 20 cts., ...	1 20
Certifying to marshal's contents of libel, 8 fol., at 15 cts.; engrossing, 10 cts.; copy, 10 cts., ...	
Filing process, 10 cts.; return, 10 cts.; entering return, 15 cts.; order for proclamation, 15 cts.; engrossing, 10 cts., ...	60
Entering decree of default, 6 fol., at 15 cts.; engrossing, 20 cts.; copy for enrollment, 10 cts., . . .	
Making report and schedule, 6 fol., at 15 cts.; engrossing, 20 cts., ...	1 10
Copy same for proctor, 30 cts.; certifying, 15 cts.; entering in register, 15 cts., ...	60
Entering final decree, 3 fol., at 15 cts.; engrossing, 10 cts.; copy, 10 cts., ...	
Docket fee, $1; making enrollment, 8 fol., at 15 cts.; engrossing, 10 cts., ...	
Drawing four orders for payment of money, each 30 cts.; engrossing, 20 cts.; copy, 20 cts., ...	
Filing other papers in cause, 10 cts., . . .	
Making this return, 3 fol., at 15 cts.; copy, 10 cts., . .	
Attendance on reference, at $3 per day, 2 days, . .	6 00
Testimony, 40 fol., at 20 cts.; 4 oaths, 10 cts. each, . .	8 40
	$

Taxed at $, , 18 .

UNITED STATES OF AMERICA, } *ss:*
DISTRICT OF . }

, clerk, being duly sworn, deposes and says that the services charged in the foregoing bill have been actually and

necessarily performed as therein stated, except such as are prospective, and those must necessarily be performed in the cause.

Subscribed and sworn before me this day of , 18 .

, Commissioner of United States.

FORM No. 144.

Enrollment of decree.

United States district court, district of .

A. B.
v.
The Ship Lena. } In admiralty.

In the said court, before the aforesaid judge, on the day of , in the year of our Lord one thousand eight hundred and , the in this cause, filed by A. B. against the said the ship Lena, her tackle, apparel and furniture, and the same is hereunto annexed, and thereupon an order was entered, directing the issuing of process against the said the ship Lena, her tackle, apparel and furniture, which order is in the following words: [Here set forth the order.] A process of arrest and monition was thereupon issued, returnable on the said day of , A. D. 188 . On the day of , A. D. 188 , the said process, with the marshal's return thereon endorsed, was duly filed, and the same is hereunto annexed.

On the day of , 188 , a decree was entered herein in the words and figures following: [Here insert the decree.] Thereupon the costs of this , including charges and expenses, were taxed at .

Whereupon the said pleadings, process, bills of cost and expenses, and such other papers as are required by the rules and practice of the court, are now attached together and hereto annexed, and the said final decree is signed and enrolled the day and year in the caption of this enrollment mentioned.

J. B., District judge.

Form No. 145.

Decree of condemnation—another form.

In the District Court of the United States in and for the district of .

The United States of America	Sur information filed.
v.	
The Ship Lena and her tackle, furniture, etc., late in possession of .	In admiralty.

And now this day of , A. D. one thousand eight hundred and , it is adjudged, ordered and decreed that the ship Lena, and her tackle, furniture and apparel in the information and claim mentioned, be and the same are condemned as forfeited for the causes in the said information set forth.

Form No. 146.

Execution.

United States of America, district of .	*ss:*	In admiralty.

The President of the United States of America to the marshal of the United States for the district of , and to his deputy, whomsoever, *Greeting:*

Whereas in a certain cause of civil and maritime, moved and prosecuted before the district court of the United States of America for the district of , on behalf of A. B. against the ship Lena, her tackle, apparel and furniture, it was, on the day of , A. D. 18 , by a decree of the aforesaid court, pronounced, decreed and declared that the said A. B. was entitled to recover in the said cause the sum of dollars and cents, together with costs and expenses in the said suit; and whereas the said ship Lena, her tackle, apparel and furniture were delivered out of the custody of the court, in virtue of

a bond executed by N. M. as principal and C. L. as surety, by which bond the said principal and sureties stipulated to abide the decree of the court in this cause; and whereas the said costs and expenses have been taxed at dollars and cents: Now therefore, in order that full and speedy justice may be done in the premises, you are hereby strictly charged and commanded jointly and severally that of the goods and chattels of the said N. M. and C. L., or of either of them, in your district, you cause to be made the said sum so decreed, and also the said costs and expenses, amounting, in the whole, to the sum of dollars and cents; and you are hereby further strictly charged and commanded, if sufficient goods and chattels of the said N. M. and C. L., or of some one of them, cannot be found in your district, that you cause the said sum to be made out of any real property, lands or tenements of which they are or either of them was possessed in your district, on the day of , 18 . And do you further have the said moneys, and pay the same into the registry of the said court, at the city of , on the Tuesday of next, and do you then and there certify to the aforesaid court what you shall have done in the premises, together with these presents.

Witness the honorable , judge of the said court, at the city of , this day of , 18 .

[L. S.] G. F., Proctor.

L. M., Clerk.

FORM NO. 147.

Direction by the clerk endorsed on execution.

United States district court, district of .

A. B.
v.
The Ship Lena. } In admiralty.

The marshal will levy $ with interest from the day of , 18 , besides his fees, poundage and expenses hereon.

L. M., Clerk.

Form No. 148.

Marshal's return.

In obedience to the within writ I have collected the sum of $ in full of the requirements of the within execution, and have paid the same into the registry of the court, as I am required.

Dated the day of , 18 .

, U. S. marshal.

By , Deputy.

Form No. 149.

Warrant of arrest in personam.

UNITED STATES OF AMERICA, DISTRICT OF . } *ss:* In admiralty.

The President of the United States of America to the marshal of the district of , and to his deputy, whomsoever, *Greeting:*

You are hereby jointly and severally empowered and strictly enjoined and commanded that you arrest if he shall be found within your district; and him so arrested you keep under safe and secure arrest, so that his body may be had and forthcoming before the judge of the district court of the United States of America for the district of , at the city of , on the day of , if it be a court day, else on the court day next following, at o'clock in the noon, there to answer unto in a cause of civil and maritime, and further to do and receive in this behalf as to justice shall appertain; and that you duly certify the aforesaid judge what you shall do in the premises, together with these presents.

Witness the honorable , judge of the aforesaid court, at the city of , this day of , in the year of our Lord one thousand eight hundred and .

Action for $.

[L. S.] G. F., Proctor.

L. M., Clerk.

FORM NO. 150.

Marshal's citation.

In Admiralty.

UNITED STATES OF AMERICA, DISTRICT OF . } *ss:*

Whereas a libel hath been filed in the district court of the United States of America for the district of , on the day of , in the year of our Lord one thousand eight hundred and , by , Esq ., proctor , in behalf of A. B. against the ship Lena, and praying the usual process and monition of the court, that all persons interested in the said the ship Lena, her tackle, apparel and furniture, may be cited to answer the premises, and all due proceedings being had, that the same may be decreed to be sold, and the proceeds thereof to be distributed according to law: Therefore, in pursuance of the said monition under the seal of the said court, to me directed and delivered, I do hereby give notice generally, unto all persons having or pretending to have any right, title or interest therein, and to , master of the said the ship Lena, in special, to appear before the aforesaid court, at the city of , on the day of , if it be a court day, or else on the next court day thereafter, at o'clock in the noon, then and there to answer the said libel and to make their allegations in that behalf.

Dated at , the day of , in the year of our Lord one thousand eight hundred and .

G. F., Proctor.

, U. S. marshal.

By , Deputy.

FORM NO. 151.

Venditioni exponas.

In Admiralty.

UNITED STATES OF AMERICA, DISTRICT OF . } *ss:*

The President of the United States of America to the marshal of the district of , and to his deputy, whomsoever, *Greeting:*

Whereas in a certain cause of , civil and maritime, moved and prosecuted before the district court of the United States of America for the district of , on behalf of , against the vessel called the , her boats, tackle, apparel and furniture, and against all persons in general having, or pretending to have, any right, title or interest therein, it was, on the day of , by a decree of the aforesaid court, pronounced, decreed and declared that the demand of the said , in the in this cause set forth, was valid and effectual against the said to the amount of dollars and cents; and that the same ought to be paid to the said , together with the costs and charges by incurred in the prosecution of said suit, as by the said decree remaining as of record in the said court doth more fully appear; and whereas the costs and expenses so decreed to be paid to the said amount to the sum of dollars and cents, as taxed in the aforesaid court; and whereas it was by the aforesaid court accordingly further ordered that the said , her boats, tackle, apparel and furniture should be sold to pay the said above-mentioned sums of money, amounting, in the whole, to dollars and cents: Now therefore, in order that speedy justice may be done in the premises, you are hereby strictly charged and commanded, jointly and severally, that you expose to public sale the aforesaid , her boats, tackle, apparel and furniture, and that you sell the same to the best bidder; and that you bring the proceeds arising from such sale into the registry of the aforesaid court, on or before the day of , and that you duly certify the judge of the aforesaid court what you shall do in the premises.

Witness the honorable , judge of the aforesaid court, at the city of , this day of , in the year of our Lord one thousand eight hundred and .

[L. S.] G. F., Proctor.

L. M., Clerk.

Form No. 152.

Monition.

UNITED STATES OF AMERICA, DISTRICT OF . } *ss:* In admiralty.

The President of the United States of America to the marshal of the United States for the district of , and to his deputy, whomsoever, *Greeting:*

You are hereby jointly and severally strictly charged and commanded that you monish and cite all persons in general having, or pretending to have, any right, title or interest in the proceeds of the sale of , now in the registry of the district court of the United States of America for the district of , to appear before the said court, at the city of , in the said district, on the day of , to answer the petition of in a cause ; and further to do and receive in this behalf as to justice shall appertain.

Witness the honorable , judge of the aforesaid court, at the city of , this day of , in the year of our Lord one thousand eight hundred and .

[L. S.] G. F., Proctor.

G. H., Clerk.

Form No. 153.

Marshal's notice.

UNITED STATES OF AMERICA, DISTRICT OF . } *ss:* In admiralty.

Whereas a petition hath been filed in the district court of the United States of America for the district of , on the day of , in the year of our Lord one thousand eight hundred and , by , esquire, proctor, in behalf of , of , in the state of , against the proceeds of the sale of the , now in the registry of the said court, stating and alleging that , and praying the usual process and monition of the said court, that all persons having or pretending to have any right, title or interest therein may

be cited to answer the premises, and all due proceedings being had, that the demand of the petitioner may be decreed to be paid out of the said proceeds.

Therefore, in pursuance of the said monition, under the seal of the said court, to me directed and delivered, I do hereby give notice generally unto all persons having or pretending to have any right, title or interest in the said proceeds, to appear before the said court at the city of , on the day of , if it shall be a court day, otherwise on the next court day thereafter, at o'clock in the noon, to answer the petition of the said , and further to do and receive in this behalf as to justice shall appertain.

Dated at , the day of , in the year of our Lord one thousand eight hundred and .

G. F., Proctor.

, U. S. marshal.
By , Deputy.

Form No. 154.

Final decree pro confesso.

[Title as in Form No. 110.]

In Admiralty.

At a special session of the district court of the United States of America for the district of , held at the city of , in the said district, on the day of , in the year of our Lord one thousand eight hundred and .

Present—the honorable , district judge.

The mesne process returnable this day in this cause having been returned duly executed, and upon proclamation duly made for all persons having, or pretending to have, any right, title or interest in the said , her tackle, apparel and furniture, to appear and make due answer to the , filed in this cause no person having appeared to answer the same, the court, on motion of , advocate for the , doth pronounce all persons whatsoever to be in contumacy and default, and doth order and adjudge that the filed in this cause be and the same hereby is taken *pro confesso* against all persons whatsoever; and it is further ordered that the libellant ought to have and receive the sum of

dollars and cents by demanded in the libel in this cause on account of the .

FORM NO. 155.

Clerk's bill of fees.

United States circuit court, district of .

v. } In admiralty.

Filing libel, 10 cts.; entering order for process in minutes, 15 cts.; engrossing, 10 cts.; copy for enrollment, 10 cts.,	$0 45
Issuing process, $1; seal, 20 cts., ...	1 20
Certifying to marshal's contents of libel, fol. 4, 15 cts.; engrossing, 10 cts.; copy, 10 cts., ...	1 40
Filing process, 10 cts.; return, 10 cts.; entering return, 15 cts.; order for proclamation, 15 cts.; engrossing, 10 cts., ...	60
Entering final decree, fol. 4, 15 cts.; engrossing, 10 cts.; copy, 10 cts.; copy for proctor, 10 cts., . . .	1 80
Docket fee, $1; making enrollment, fol. 8, 15 cts.; engrossing, 10 cts., ...	3 00
Drawing four orders for payment of money, each 30 cts.; engrossing, 20 cts.; copy, 20 cts., ...	2 80
Filing other papers in cause, 10 cts., ...	
Making this return, folio 3, 15 cts.; copy, 10 cts.; . .	75
	$12 00

Taxed at $.

L. M., Clerk.

UNITED STATES OF AMERICA, } *ss:*
DISTRICT OF . }

, clerk, being duly sworn, deposes and says that the services charged in the foregoing bill have been actually and necessarily performed as therein stated, except such as are prospective, and those must necessarily be performed in the cause.

Subscribed and sworn before me, this day of , 18 .

, Commissioner of United States.

Form No. 156.

Information; seizure.

UNITED STATES DISTRICT COURT, DISTRICT OF . } *ss:*

At a session of the district court of the United States of America held in and for the district of , at the city of , on the day of , in the year of our Lord one thousand eight hundred and , before the honorable , judge of the said court, comes E. F., attorney of the said United States of America in and for the said district, who prosecutes for the United States of America in this behalf, and being present here, in this honorable court, in his own proper person, in the name and on the behalf of the said United States of America, gives the said court now here to understand and be informed as follows, that is to say,

That G. H., collector of for the district of , in the said district of , and within the jurisdiction of this court, heretofore, that is to say, on the day of , in the year one thousand eight hundred and , to wit, at , in the said district of , and within the jurisdiction of this court, seized as forfeited to the use of the United States of America [here describe the goods], being the goods, chattels and property of some person or persons to the said United States of America, and to their said attorney, unknown, and being subject to duty to the said United States of America, on being imported into the said United States of America.

For that heretofore, that is to say, on the day and year last aforesaid, the goods, chattels and property aforesaid being subject to duty as aforesaid on being imported into the said United States of America, were imported and brought into the said United States of America, that is to say, into the said district of , in the said district of , and within the jurisdiction of this court, from some foreign territory adjacent to the said United States of America, to the said United States of America and their said attorney unknown, in and on board of some unregistered vessel, boat, raft, canoe, carriage or sleigh, or by some person or per-

sons coming from the said adjacent foreign territory to the said United States of America, and to their said attorney unknown.

Yet the master of the said unregistered vessel, or the person having charge of the said boat or raft, or the conductor or driver of the said carriage or sleigh, in which the said goods and chattels were imported and brought as aforesaid from the said adjacent foreign territory, or the person or persons coming from the said adjacent foreign territory with the said goods, chattels and property, did not immediately on his arrival within the said United States of America deliver a manifest of the cargo or loading of the said unregistered vessel, boat, canoe, raft, carriage or sleigh, in which the said goods, chattels and property were imported and brought as aforesaid into the said United States of America, or of the said goods, chattels and property, or of any part thereof, at the office of the collector or deputy collector nearest to the boundary line between the said United States of America and the adjacent foreign territory, or nearest to the road or waters by which the said goods, chattels and property were imported and brought into the said United States as aforesaid, but the master of the said unregistered vessel, and the person having charge of said boat, canoe or raft, and the conductor or driver of said carriage or sleigh, with the said goods, chattels and property, or the person or persons coming from the said adjacent foreign territory into the said United States of America, with the said goods, chattels and property, did neglect and refuse to deliver such manifest, and did also pass by and avoid the said office, contrary to the form of the statute in such case made and provided, whereby, and by force of the statute in such case made and provided, the said goods, chattels and property became and were forfeited to the use of the said United States of America.

And the said attorney of the United States, on behalf of the said United States, saith that by reason of all and singular the premises aforesaid, and by force of the statute in such case made and provided, the aforementioned and described goods, wares and merchandise became and are forfeited to the use of the said United States: And that all and singular the premises aforesaid are and were true, public and notorious, of which due proof being made, the said attorney prays the usual process and monition of this honorable court in this behalf to be made; and that all person or persons interested in the before-mentioned and described goods, wares and merchan-

dise may be cited in general and special to answer the premises, and all due proceedings being had thereon, that the said goods, wares and merchandise may, for the causes aforesaid and others appearing, be condemned by the definite sentence and decree of this honorable court, as forfeited to the use of the said United States, according to the form of the statutes of the United States in such cases made and provided.

G. F., United States attorney for the
_____ district of .

Form No. 157.

Another form of information; seizure.

United States District Court, } ss:
district of . }

That G. H., collector of the customs for the district of , having full power and authority to enter any store, warehouse or other building upon or near the boundary line between the United States and any foreign country in which he should have reason to believe any goods, wares or merchandise, subject to duty, were concealed, and therein to search for, seize and secure such goods, wares and merchandise, heretofore, to wit, on the day of , in the year one thousand eight hundred and , having reason to believe and suspect that such goods, wares and merchandise which were subject to duty were concealed in a certain store on or near the boundary line between the United States and the province of Canada, the said collector thereupon did enter the said store, and did seize goods, wares and merchandise subject to duty, to wit [here describe the property], upon which no duties had been paid and no duties had been secured to be paid on the same.

And also for that the aforesaid goods, wares and merchandise, subject to duty on being imported into the United States, were heretofore, to wit, on the day of , in the year one thousand eight hundred and , found by , collector of customs of the district of , in the possession of some person or persons to the said attorney unknown, at , in the said district; and the said [here describe the goods] had not impressed thereon the inspection marks as required by the provisions of the statute in such case made and provided. Your informant therefore prays

that said property may be attached and condemned as forfeited to the United States.

G. F., United States attorney for the district of .

FORM NO. 158.

Attachment, on the foregoing information.

UNITED STATES OF AMERICA, DISTRICT OF . } *ss:*

The President of the United States of America to the marshal of the district of , *Greeting:*

Whereas an information has been filed in the district court of the United States for the district of , on the day of , 18 , on behalf of the said United States, by G. F., Esq., attorney of the said United States for the district aforesaid, against , which by , collector of for the district of , on the day of , 18 , at the said district of , in the district of , were seized as forfeited to the use of the said United States, for the reasons and causes in the said information mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said may be cited in general and special to answer the premises, and all due proceedings being had, that the said property above mentioned may, for the causes in the said mentioned, be condemned as forfeited to the use of the said United States, according to the form of the statute in such case made and provided: You are therefore hereby commanded to attach the said , and to detain the same in your custody until the further order of the court respecting the same, and to give due notice unto all persons claiming the said property, or knowing or having anything to say why the same shall not be condemned as forfeited, pursuant to the prayer of the said , that they be and appear before the said district court, to be held in and for the district of , at the city of , in the county of , in the said district of , on the day of next, at o'clock in the noon of the same day, if the same

shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their allegations on that behalf. And what you shall have done in the premises, do you then and there make return thereof with this writ.

Witness the honorable , district judge of the United States for the district of , at the city of , the day of , 18 .

[L. S.] E. F., U. S. attorney.

G. H., Clerk.

Form No. 159.

Marshal's return to within [or foregoing] writ.

In obedience to the within writ, I did, on the day of , 18 , at , seize and attach the within-mentioned property, and I have duly cited all persons to appear and assert their claims, as I am within commanded.

Dated .

. Q. J., Marshal.

Service, $. By L. M., his deputy.

Travel, miles, at six cents per mile, $.

Total amount, $.

Form No. 160.

Marshal's notice.

UNITED STATES OF AMERICA, DISTRICT OF . } *ss:*

Whereas a hath been filed in the district court of the United States of America for the district of , on the day of , in the year of our Lord one thousand eight hundred and , by , esquire, United States attorney, in behalf of the United States of America, against , stating that the same were, on the day of , by , esquire, collector of for the district of , seized as forfeited to the use of the said United States; and further stating and alleging that the said forfeiture was incurred by reason and for other reasons,

as will more fully appear by reference to the said on file with the clerk of said court at , and praying the usual process and monition of the said court, that all persons interested in the said , etc., etc., may be cited to answer the premises, and all due proceedings being had, that the same may be condemned and sold, and the proceeds thereof be distributed according to law; therefore, in pursuance of the said monition, under the seal of the said court to me directed and delivered, I do hereby give notice unto all persons generally having, or pretending to have, any right, title or interest therein, to appear before the aforesaid court in the city of , on the day of next, if it be a court day, or else on the next court day thereafter, at o'clock in the noon, then and there to answer the said and to make their allegations in that behalf.

Dated at , the day of , in the year of our Lord one thousand eight hundred and .

I. J., United States marshal.

L. M., Deputy.

Form No. 161.

Final decree, pro confesso.

At a stated session of the district court of the United States for the district of New York, held at the city of on the day of , 18 .

Present—the honorable , district judge.

The United States
v.

The mesne process heretofore issued in this cause and returnable at this term of the court having been duly returned, and proclamation having been made for all persons having or claiming any right, title or interest in the property mentioned and described in the information herein to come forward and assert their claims on the pain of being pronounced in contumacy and default, and a decree *pro confesso* being taken against them, and no person having appeared or asserted any claim thereto, the court now here doth pronounce all persons having or claiming any right, title or interest in the said property to be in contumacy and default, and that

the information in this cause be taken as confessed. And this court having proceeded to hear this cause *ex parte*, and having considered the same, it is hereby ordered and adjudged that the property mentioned and described in this suit be and is hereby condemned as forfeited to the use of the United States. And it is further ordered that the said property, in said information described, be sold by the marshal at public sale, according to the statute, and the rules and practices of the court, at , in the said district of , and that the marshal pay the proceeds of said sale into the registry of the court with all proper speed.

FORM NO. 162.

Clerk's costs.

United States district court, district of .

v. }

Filing , 10 cts.; entering order process, 15 cts.; copy, 10 cts.; engrossing, 10 cts.; filing, 10 cts., . .	$0 55
Issuing process and seal, $1 20; notices for marshal, $1 20,	2 40
Entering decree of default, etc., 3 folios, 15 cts.; copy, 30 cts.; engrossing, 30 cts.; filing, 10 cts., . .	1 15
Copy for dist. att'y, fol. , 10 cts.; cert., 15 cts.,	
Docket fee, $1; judgment record, fol. , 15 cts., .	
Issuing venditioni exponas and seal, ...	1 20
Percentage on sale paid in, $, ...	
Entering order distribution, 2 fol., 15 cts.; copy, 20 cts.; engrossing, 20 cts.; filing, 10 cts., ...	80
Abstract proceedings, 3 fol., 15 cts.; copy for solr. try., 30 cts,; do. for colr., 30 cts., ...	1 05
Drawing 4 order checks, 2 fol. each, at 15 cts., . .	1 20
Copy each, 80 cts.; entering each in ledger, 60 cts., . .	1 40
Filing other papers, 10 cts.; taking affidavits, 25 cts.,	
	$

Taxed and allowed at $ this day of , 18 .

H. L., District judge.

UNITED STATES OF AMERICA, DISTRICT OF . } ss:

G. H., clerk of said court, being duly sworn, says that the services charged in the foregoing bill have been or will be actually and necessarily rendered in the progress of this cause, as therein stated.

Sworn and subscribed before me, this day of , 18 .

Q. R., Commissioner United States circuit court.

FORM NO. 163.

Warrant to sell in such a case.

UNITED STATES OF AMERICA, DISTRICT OF . } ss:

The President of the United States of America to the marshal of the United States for the district of , *Greeting:*

Whereas a hath been filed in the district court of the United States for the district of , on the day of , 18 , on behalf of the United States, by , Esq., attorney of the said United States for the district aforesaid, against , stating and alleging that for the reasons and causes specified in the said , the said property above described had been seized and become forfeited to the use of the said United States, and praying that the same may be condemned as forfeited to the use of the said United States; and whereas the said property above described has been attached by the process issued out of the said district court, in pursuance of said , and is now in custody by virtue thereof, and such proceedings have been thereupon had that by the definite sentence and decree of the said district court, in this cause made and pronounced on the day of , 18 , the said property above described was condemned as forfeited to the use of the said United States, and was ordered to be sold by you, the said marshal, at , after giving days notice of such sale according to law; and that you have the

moneys arising from such sale, together with this writ, at the next stated session of the said district court of the United States, to be held for the district of , at the city of , on the day of next; therefore, you, the said marshal, are hereby commanded to cause the said above-described property, so condemned and ordered to be sold, to be sold in manner and form upon the notice and at the time and place aforesaid, and that you have and pay the money arising from such sale, as in said decree directed, and have you also then and there this writ.

Witness the honorable , district judge of the district of , at the city of , the day of , 18 .

G. H., Clerk.

Form No. 164.

Information—another form; seizure.

U. S. District Court,
District of . } ss:

At a session of the district court of the United States of America for the district of , begun and held at the United States buildings in the city of , in the state of , in the said district, before the judge of the same court, on the day of , in the year one thousand eight hundred and , comes , attorney of the United States for the said district of , who prosecutes for the said United States in this behalf, and being present here in court, in his own proper person, in the name and on behalf of the said United States, alleges, informs and declares as follows, to wit:

First. That , collector of internal revenue for the district of the state of , heretofore, to wit, on the day of , in the year one thousand eight hundred and , on land at the , within the district of , and within the jurisdiction of this court, seized, as forfeited to the use of the United States, the following described goods, wares and merchandise, articles and objects, that is to say:

That the said goods, wares and merchandise, articles and objects, then and there being so subject to the payment of duties and taxes as aforesaid, were found by the said , such collector as aforesaid, in the possession and custody and within the control of , for the purpose of being removed by , in fraud of the internal revenue laws of the United States, and with the design to avoid the payment of such duties and taxes as provided by § 3257 and § 3261 of the Revised Statutes.

That the said goods, wares and merchandise, articles and objects, except the said , were raw materials, tools, implements, instruments and personal property in the place and building and within the yard and enclosure where said articles upon which duties are and were imposed as aforesaid were found and seized by the said , as such collector as aforesaid, at the time and place aforesaid, and were intended to be used by in the fraudulent manufacture by the said of such raw materials as aforesaid into highwines, whisky, distilled spirits and spirituous liquors, and in fraud of the internal revenue laws of the United States, and with the design to avoid the payment of the duties imposed by the before-mentioned statutes, and against the section thereof.

That the said goods, wares and merchandise, articles and objects, then and there being so subject to the payment of duties and taxes as aforesaid, were found by the said , such collector as aforesaid, in the possession and custody and within the control of , for the purpose of being sold by , in fraud of the internal revenue laws of the United States, and with design to avoid the payment of such duties and taxes, against the provisions of the section aforesaid.

That the said goods, wares and merchandise, articles and objects, except the said , were raw materials, tools, implements, instruments and personal property in the place and building and within the yard and enclosure where said articles upon which duties are and were imposed as aforesaid were found and seized by the said , as such collector as aforesaid, at the time and place aforesaid, and were intended to be used by in the fraudulent manufacture by the said of such raw materials as aforesaid into highwines, whisky, distilled spirits and spirituous liquors, and in fraud of the internal revenue laws of the United States,

and with the design to avoid the payment of the duties imposed by the before-mentioned statutes, and against the section thereof.

That upon said goods, wares, merchandise, articles and objects, duties and taxes are imposed by the provisions of the section of the statute aforesaid.

That the said goods, wares and merchandise, articles and objects, then and there being so subject to the payment of duties and taxes as aforesaid, were found by the said , collector, in the possession and custody and within the control of , at , within the said collection district, in the district of , for the purpose of being sold by said , in fraud of the said internal revenue law, and with design to avoid the payment of such duties and taxes, against the provisions of section of the statutes aforesaid.

That the said goods, wares and merchandise, articles and objects, then and there being so subject to the payment of duties and taxes as aforesaid, were found by the said , collector, in the possession and custody and within the control of the said , at , aforesaid, for the purpose of being removed by him in fraud of the internal revenue laws, and with the design to avoid the payment of such duties and taxes, against the provisions of section of the statutes aforesaid.

Second. For that the aforesaid goods, wares and merchandise, articles and objects, , and distilled spirits, were liable to taxation under and pursuant to the statutes in such case made and provided, and the said and distilled spirits were so as aforesaid found and seized at , in the collection district of the state of , in the district of , and within the jurisdiction of this court, by the said , as such collector, on the said day of , A. D. 18 , the said distilled spirits having been made, manufactured and distilled at some place, at some time, and by some person or persons to the said United States and their said attorney unknown, and the same were thereafter, and before the time of the finding and seizure thereof, as aforesaid, by some person or persons to the said United States and their said attorney unknown, removed from the place where the same were distilled, otherwise than into a bonded warehouse, as provided by law; and the said

and distilled spirits were, by the said , as such collector, as aforesaid, found and seized at the time and place aforesaid, the said and distilled spirits being so found elsewhere than in a bonded warehouse, not having been removed from such warehouse, according to law, and the tax imposed by law upon the same not having been paid, in fraud of the internal revenue laws, and against the provisions of the statutes aforesaid.

Form No. 165.

Attachment in rem in proceedings for forfeiture.

UNITED STATES, DISTRICT OF . } *sct.*

The President of the United States to the marshal of the district of .

You are hereby commanded forthwith to seize and attach , lately in the possession of , as the same now are, and the same safely keep, to abide the final order and decree of the district court of the United States for the district of , in a certain plea or information herein prosecuted against the said property, etc., by the United States of America, libellants, for forfeiture, etc. And you are further commanded, in the name and by the authority aforesaid, to cite and admonish the said and generally all others herein concerned, so that they be and appear at a special session of said court, to be holden at , on the day of , at ten o'clock in the forenoon of the same day, then and there to show cause, if any they have, why the said property, etc., should not be condemned as forfeited for the causes in said libel or information set forth. And have you then there this writ.

Witness the honorable , judge of the said court, at , this day of , A. D. 18 , and in the year of the independence of the United States.

, Clerk district court of the United States.

Form No. 166.

Taxed bill costs.

United States circuit court, district of .

The United States
v. } Clerk's costs on seizure in revenue case.

Filing , 10 cts.; entering order for process and copy, 25 cts., ...	$0 35
Issuing process, $1, seal, 20 cts., ...	1 20
Draft report to the Solicitor of the Treasury, fol. 1 and copy, and entering, 40 cts.; filing, 10 cts., . .	50
Draft and two copies certificate of substance of information from files for publication by the U. S. marshal, fol. at 35 cts., ...	
Order to return monition and copy, 25 cts.; filing monition and return, 20 cts.; entering return, 15 cts., . .	60
Order for proclamations and copy, 25 cts.; order for defaults and copy, 25 cts., ...	50
Order for condemnation, 15 cts., sale, 15 cts., copies at 10 cts. each, ...	50
Drawing decree and entering, fol. at 15 cts.; copy at 10 cts.; filing, 10 cts., ...	
Order for venditioni exponas, 15 cts.; copy, 10 cts., .	25
Issuing venditioni exponas, $1; seal, 20 cts., . . .	1 20
Drawing final records with pleadings, etc., fol. at 15 cts.,	
Drawing copy records with pleadings, etc., fol. at 10 cts.; filing, 10 cts., ...	
Order to return venditioni exponas, 15 cts.; copy, 10 cts.,	25
Filing venditioni exponas, 10 cts.; filing return, 10 cts.; entering return, 15 cts., ...	35
Drawing and copy report to solicitor, fol. at 25 cts.; filing, 10 cts., ...	
Clerk's fee for receiving, keeping and paying out $, at 1 per cent., ...	
Drawing abstract, 15 cts. per fol.; copy, 10 cts.; filing, 10 cts., ...	
Order for distribution and copy, 25 cts., ...	25
Taxing district attorney's cost, $1; filing, 10 cts., . .	1 10

Taxing marshal's cost, $1; filing, 10 cts.; filing vouchers at 10 cts.,	
Clerk's fee on entering order-check, recording, etc., to pay marshal's costs,	1 60
Clerk's fee on entering order-check, recording, etc., to pay district attorney and clerk,	1 60
Clerk's fee on entering order-check, recording, etc., to pay informer's moiety,	1 60
Clerk's fee on entering order-check, recording, etc., to pay collector's net proceeds,	1 60
Drawing and copy receipts for amounts paid, fol. at 25 cts.; filing same at 10 cts. each,	
Copy of abstracts and receipts from files for solicitor and collector, fol. at 10 cts.,	
Drawing certificates, 15 cts.; copies at 10 cts.,	
Entries in ledger, 15 cts.; copy costs from files, fol. at 10 cts.,	
Filing clerk's cost, 10 cts.; making dockets and indexes, $1,	1 10
Drawing and copy report to solicitor of suit decided, fol. 1, 25 cts.; entering, 15 cts.; filing, 10 cts.,	50
Duplicate copies from the files of monition, decree, venditioni exponas, abstracts, account sales, district attorney, marshal and clerk's costs for collector, fol. at 10 cts.,	
Certifying each at 25 cts.; seals at 20 cts.,	90
Draft and two copies of affidavit of services of clerk, etc., fol. 1 and entry,	50
Oath to same and certificate, 25 cts.; oath to marshal's costs and certificate, 25 cts.,	50
	$

Taxed and adjusted at dollars.

E. F., Clerk of the U. S. circuit court.

U. S. CIRCUIT COURT, DISTRICT OF . } *ss:*

, clerk, being duly sworn, deposes and says that the services charged herein have been or will be actually and necessarily performed as herein stated, to the knowledge of this deponent, and

are, as this deponent believes, in accordance with the fee bill of 1853.

Sworn to before me this day of , 18 .

G. H., U. S. commissioner.

FORM No. 167.

Bills of taxed costs.

United States district court, district of .

v. } Proctor's bill.

Docket fee (decree over fifty dollars), ...	$20 00
Verification of libel, 25 cts.; verification of costs, 25 cts.,	50
Four depositions taken and admitted as evidence, . .	10 00
Paid one witness attending three days, ...	4 50
Paid 120 miles travel, 5 cts. per mile, ...	6 00
Paid two witnesses attending one day each, . . .	3 00
Paid travel of two witnesses 150 miles each, 5 cts. per mile, ...	15 00
Paid one witness one day, ...	1 50
Paid travelling fee for same 60 miles, 5 cts. per mile, .	3 00
Paid notary public, taking depositions, ...	15 00
	$78 50

Taxed at $78 50.

, Clerk.

UNITED STATES OF AMERICA, } *ss:*
DISTRICT OF . }

G. F., of the city of , being duly sworn, deposes and says that the services charged for in the foregoing bill have been actually and necessarily rendered as therein stated; that the expenses therein mentioned have been actually and necessarily incurred as therein set forth.

Subscribed and sworn before me this day of , 18 .

G. F., U. S. commissioner.

FORM No. 168.

Marshal's bill.

United States district court, district of .

v. }

Serving mesne process at , ...	$2 00
Travel to serve the same, 10 miles, 6 cts. per mile, . .	60
Proclamation, ...	30
Expenses of custody actually paid, 124 days at 50 cts., .	62 00
Oath and certificate disbursements, ...	50
Paid printer for publishing notice of arrest, . . .	6 00
Serving warrant to sell, ...	2 00
Travel to return the same, 10 miles, 6 cts. per mile, .	60
Paid printer for publishing notice of sale, . . .	3 40
Poundage on $4100, amount of sale, ...	65 00
Paid for storing sales, ...	5 00
Drawing and executing deed, ...	5 00
Paid for copy of enrollment, ...	50
Percentage on disbursements, ...	1 30
	$154 20

Taxed at $154 20 this day of , 18 .

, Clerk.

UNITED STATES OF AMERICA, DISTRICT OF . } *ss:*

G. H., deputy marshal of the said district, being duly sworn, deposes and says that the services charged in the foregoing bill have been actually and necessarily performed as therein stated, and that the expenses mentioned in said bill have been actually and necessarily incurred as therein set forth.

Subscribed and sworn before me this day of , 18 .

G. H., U. S. commissioner.

Form No. 169.

Clerk's bill.

United States district court, district of .

v. }

Filing libel, 10 cts.; entering order of process, $1, . .	$ 1 10
Issuing process and seal, $1 20; marshal's notices, $1 20,	2 40
Filing process, 10 cts.; entering return, 15 cts.; filing stip. 10 cts., ...	35
Entering four orders continuance, one folio each at 15 cts.; engrossing each, 10 cts.; filing each, 10 cts., . .	1 40
Filing stip., 10 cts.; entering order substitution, 15 cts.; engrossing, 10 cts.; filing, 10 cts., ...	45
Filing petition, 10 cts.; entering order sale, two folios, 30 cts.; engrossing, 20 cts.; filing, 10 cts., . .	70
Issuing warrant, $1 20; filing, 10 cts., ...	1 30
Filing answer, ...	10
Entering order for payment of marshal's bill, 15 cts.; eng., 10 cts.; filing, 10 cts., ...	35
Entering order for trial, 15 cts.; swearing two witnesses, 20 cts., ...	35
Docket fee, $3; entering final decree, four folios, 15 cts. each; engrossing, 40 cts.; filing, 10 cts., . . .	4 10
Making enrollment, eight folios, 15 cts. each, . . .	1 20
Drawing four order checks, 30 cts.; copying each, 20 cts.; entering each in ledger, 15 cts., ...	2 60
Filing three bills of costs, 30 cts.; filing five other papers, 50 cts., ...	80
Percentage on $3500, ...	35 00
Taking testimony on trial, thirty folios, ...	6 00
	$58 20

Taxed and allowed at $58 20.

, Judge.

Form No. 170.

United States district attorney's costs.

United States district court, district of .

v.

Two per cent. on $303 48, proceeds of sale, . . . $6 07
Taxed at $6 07 this day of , 18 .
, Clerk.

United States of America, } *ss:*
district of . }

G. F., of the said district, being duly sworn, says that he is the U. S. district attorney for said district; that the services charged in the foregoing bill have been actually and necessarily performed as therein stated; and that the same or any part thereof have not been paid. G. F.

Subscribed and sworn before me, this day of , 18 .
, U. S. commissioner for the district of .

Form No. 171.

Certificate of license as counsellor.

United States of America, } *ss:*
district of . }

I, , clerk of the circuit court of the United States for the district of , in the circuit, do hereby certify that [or attorney] has been duly admitted and sworn as a counsellor of the said court, and has signed the proper roll in this office.

In witness whereof, I have hereunto set my hand and the seal of the said court, this day of , in the year of our Lord one thousand eight hundred and , and of the independence of the United States of America the .
, Clerk.

Form No. 172.

Certificate to a transcript of record.

United States of America, }
District of . } *ss:*

I, , clerk of the circuit court of the United States of America for the district of , in the circuit, do hereby certify that the foregoing pages, numbered from to inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of against , as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of , in the district of , in the circuit, this day of , in the year of our Lord one thousand eight hundred and , and of the independence of the said United States the .

, Clerk.

FORMS FOR REMOVAL OF CAUSES.

FORM No. 175.

Petition for removal in criminal cases, under section 643 of Revised Statutes.

[Title of cause.]

To the circuit court of the United States in the district of .

Your petitioner, , defendant in the above-entitled cause, respectfully represents:

That on the day of , 18 , at the term of said court, at the instance of , as prosecutor, your petitioner was indicted for willfully, premeditatedly and of malice aforethought killing one , which indictment and criminal prosecution so instituted is still pending in said court against your petitioner.

Your petitioner further represents that no murder was committed by the killing aforesaid, but in fact the killing was committed in the necessary self-defence of the defendant, your petitioner, and to save his own life; that at the time the alleged offence was committed he was an officer of the United States, to wit, a deputy collector of internal revenue, and the act for which he was indicted was done in his own necessary self-defence, while engaged in the discharge of the duties of his office as said deputy collector of internal revenue; that he was at the time acting by and under the authority of the internal revenue laws of the United States, and under and by right of his office as deputy collector of internal revenue of the United States; that it became, and was, his duty, under said revenue laws, to seize illicit distilleries and the apparatus that was used for the illicit and unlawful distillation of spirits, and while so attempting to enforce said revenue laws as deputy collector aforesaid, he was assaulted and resisted, and fired upon by a number of armed men, and in defence of his life returned fire, which is the act for which he was indicted.

Your petitioner therefore prays that said cause may be removed from the court of county, in the state of ,

to the circuit court of the United States for the district of , and that a certiorari may issue therefor.

G. F., Attorney for the petitioner.

AFFIDAVIT TO PETITION.

STATE OF , }
COUNTY OF . }

I, , being duly sworn, depose and say that I am the petitioner named in the foregoing petition, that I have read the same, and that the matters and things therein contained are true of my own knowledge.

, Petitioner.

Subscribed and sworn to before me this day of , 18 . G. H., Commissioner of U. S. circuit court.

CERTIFICATE OF COUNSEL.

I, G. F., being an attorney at law of the supreme court [or other court] of the state, the same being a court of record, do hereby certify that as counsel for the petitioner in the foregoing petition named, I have examined the proceedings against him mentioned therein, and carefully inquired into the matters therein set forth, and that I believe them to be true.

G. F., Attorney for the petitioner.

FORM NO. 176.

Certiorari, for removal case from state court.

The President of the United States of America to the court of the state of , in the judicial district, *Greeting:*

Being informed that there is now pending before you a suit in which is plaintiff and defendant, which suit was commenced in said court against the said for and on account of acts done by him under the revenue laws of the United States; that said suit was commenced by summons and complaint, and that said suit has not been tried, and we being willing for certain reasons that the said cause and the records and pro-

ceedings therein should be certified by the said court, and removed into our circuit court of the United States in and for the district of ; do hereby command you that you send without delay to the said circuit court, as aforesaid, the record and proceedings in said cause, so that the said circuit court may act thereon as of right and according to law ought to be done.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at , the day of , A. D. 18 .

, Clerk.

, Attorney for plaintiff in error.

Service of the within is hereby admitted this day of , A. D. 18 .

Form No. 177.

Petition for removal case, under section 2 of act of March 3, 1875.

court, state of , county of .

A. B.
v.
C. D.

The petition of , the above-named defendant [or plaintiff], shows to the court that the above suit was begun against him in the court of the state of , on or about the day of , 18 .

That at the time said suit was begun, and at the present time, the plaintiff [or defendant] was and is a citizen and resident of the state of , and the defendant [or plaintiff] was and is a citizen and resident of the state of .

That the matter in dispute in said suit, and for which said suit is brought, exceeds the sum of dollars exclusive of costs, and the defendant herewith files a bond with good and sufficient sureties for his entering in the circuit court of the United States for the district of , wherein said suit is pending, on the first day of the next session of said court, a copy of the record in said suit [and also for his appearing in said circuit court, and entering special bail if required], and for paying all costs that may

be awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, as provided by the statute of the United States.

Wherefore the defendant [or plaintiff] prays this honorable court that said bond may be approved and said suit be removed into the circuit court of the United States for the district of , and that this court proceed no further in the premises.

A. B. [or C. D.], Petitioner.

STATE OF , }
county of . } *ss:*

A. B., being duly sworn, says that he is the defendant in the above-entitled action, and has read the foregoing petition subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge.

Sworn to before me this day of , A. D. 18 .

, Clerk.

FORM NO. 178.

Bond on a removal with affidavit, etc.

Know all men by these presents, that we, , of the city of , and , of the city of , and , of the city of , are jointly and severally held and firmly bound unto in the penal sum of dollars, for which well and truly to be paid unto said , his heirs, executors, administrators and assigns, we bind ourselves, our heirs, executors and assigns and administrators firmly by these presents. Sealed with our seal, this day of , A. D. 18 .

The condition of this obligation is such that if the said , defendant [or plaintiff] in a suit now pending in the supreme court of the state of , for the county of , shall on the first day of the next session or term of the circuit court of the United States for the district of , enter a copy of the record in said suit, and shall enter the appearance of said in said circuit court of the United States, and shall enter special bail in the cause, if special bail were originally required, and pay all costs that may be awarded against him by said circuit

court if such court shall hold that said suit was wrongfully or improperly removed from said state court, then this obligation to be void, and otherwise to remain in full force and effect.

In witness whereof, the said obligors have hereunto set their hands and seals this day of , A. D. 18 .

STATE OF , } ss:
county of . }

On this day of , A. D. 18 , before me personally came and , to me personally known and known to me to be the persons who executed the foregoing bond, and acknowledged that they executed the same for the uses and purposes therein mentioned.

G. H., Circuit court commissioner.

FORM NO. 179.

Petition for the transfer of a cause from a state to a circuit court, under the Revised Statutes of the United States, section 639, subdivision 3.

In the court of county, state of .

A. B. } Petition for the transfer of this cause to the circuit
v. } court.
C. D. }

To the honorable the court of county, state of .

Your petitioner, , respectfully shows that he is plaintiff [or defendant] in the above-entitled suit, and that the same was commenced on or about the day of , 18 , in said court; that your petitioner was at the time of the bringing said suit, and still is, a citizen of the state of , and a resident thereof; that said action was brought for the purpose of [here state the nature of the suit and the relief asked], and that the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs.

Your petitioner further states that the suit has not been tried, but is now pending for trial in the court of the state of for said county of , and that he desires to remove the same into the circuit court of the United States for the district of , in pursuance of the statute in that behalf provided; to wit, subdivision 3 of section 639 of the Revised Statutes of the United States.

Your petitioner further says that he has filed herewith the affidavit required by the statute in such cases, and offers here his bond, executed by , with good and sufficient surety, in the penal sum of , as required by said statutes on the removal of a cause.

Your petitioner therefore prays that the said bond may be accepted as good and sufficient, and that the said suit may be removed into the next circuit court of the United States in and for said district of , pursuant to the statute aforesaid, and that no further proceedings may be had therein in this court.

G. F., Attorney for plaintiff [or attorney for defendant].

Form No. 180.

Form of affidavit of prejudice or local influence to accompany the petition under the provisions of paragraph 3, section 639 of the Revised Statutes.

In the court, county, state of .

A. B., plaintiffs,
v.
C. D., defendants.
} Affidavits of prejudice.

State of , county of , *ss:*

I, , being duly sworn, do say that I am in the above-entitled cause; that I have reason to believe, and do believe, that from prejudice and local influence I will not be able to obtain justice in said state court.

Subscribed by the said , in my presence, and by him sworn to before me, at , this day of , A. D. 18 .

A. B.

[L. S.] E. F., Notary public in and for county.

Form No. 181.

Form of bond to accompany the petition for removal.

[Title of cause.]

Know all men by these presents,

That , as principal, and , of , as surety, are held and firmly bound unto , in the penal sum of

dollars, for the payment of which, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

The condition of this obligation is such that if shall enter and file, in the next session of the circuit court of the United States in and for the district of , on the first day of its session, copies of all process, pleadings, depositions, testimony and other proceedings in a certain suit or action now pending in the court of the county of and state of , in which is plaintiff and defendant, and shall do such other appropriate acts as, by the statutes of the United States, are required in that behalf, upon the removal of a suit from a state court into the said United States court, then this obligation to be void, otherwise of force.

Dated , A. D. 18 .

A. B.
C. D.

State of , } ss:
county. }

I, , of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the state of , and a property holder therein; that I am worth the sum of dollars, over and above all my debts and liabilities, and exclusive of property by law exempt from execution; that I have property in the state of , liable to execution, of the value of more than hundred dollars.

C. D.

Subscribed in my presence by , and by him sworn to before me this day of , 18 .

, Clerk.

Form No. 182.

Form of petition for removal where the adverse parties are all citizens of different states.

In the court of county, state of .

A. B. and C. D., plaintiffs,
v.
E. F. and G. H., defendants. } Petition for removal.

To said court:

Your petitioner, E. F., respectfully shows to this honorable court

that the amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different states; that each adverse party is a citizen of different states; that your petitioner was, at the time of the commencement of this suit, and still is, a citizen of the state of , and that then was, and still is, a citizen of the state of , and that then was, and still is, a citizen of the state of [and so state the citizenship of other parties].

Your petitioner offers herewith a bond with good and sufficient surety for his entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto. And he prays this court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the district of .

E. F., by G. H., his attorney.

[If verified, which is not required by the statute, it may be in the following form:]

State of , }
county. } *ss:*

I, E. F., being duly sworn, do say that I am one of the defendants in the above-entitled cause; that I have read the foregoing petition and know the contents thereof; and that the statements and allegations therein contained are true, as I verily believe.

Subscribed by the said in my presence, and by him sworn to before me, this the day of , A. D. 18 .

I. J.

Form No. 183.

Bond for the removal of a cause under the act of March 3, 1875.

[Title of cause.]

Know all men by these presents, that I, , as principal, and , as surety, are held and firmly bound

unto in the penal sum of dollars, the payment whereof well and truly to be made unto the said , heirs and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said having petitioned the court of county, state of , for the removal of a certain cause therein pending, wherein is plaintiff and defendant , to the circuit court of the United States in and for the district of .

Now, if the said , your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto [if special bail was originally requisite in said cause, then add, "and shall then and there appear and enter special bail in said suit"], then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals, this day of , A. D. 18 .

[L. S.]

[It is perhaps advisable that the sureties justify, but it does not appear to be absolutely necessary.]

Form No. 184.

Order of state court for removal of cause.

At a term of the court, held at the in the city of , on the day of , A. D. 18 .

Present:—Honorable , justice.

court, county of .

A. B.
v.
C. D.

On the pleadings and proceedings herein, and on the petition and bond filed herein by the defendant under the statutes of the United States, and on motion of , defendant's attorney, it is or-

dered that the security offered by the defendant be accepted and said bond approved, and that the state court proceed no further in this cause, and that this cause be removed into the United States circuit court in and for the district of .

, Clerk.

FORM No. 184*a*.

Notice of the removal of a cause.

Circuit court of for the circuit of .

A. B.
v.
C. D.

To , attorney for the plaintiff.

You will please take notice that on the day of , 18 , by an order of the court of the state of , the above-entitled cause was transferred to the circuit court of the United States for the circuit, district of .

H. J., Defendant's attorney.

April , 18 .

FORM No. 184*b*.

Form of writ of certiorari under section 7 of the act of March 3, 1875.

The President of the United States of America to the judge of the court of [here describe the state court by name].

Whereas it has been represented to the circuit court of the United States for the district of that a certain suit was commenced in the court of [here name the state court], wherein , a citizen of the state of , was plaintiff and , a citizen of the state of , was defendant, and that the said duly filed in the said state court his petition for the removal of said cause into the said circuit court of the United States, and filed with said petition the bond with surety required by the act of Congress of March 3, 1875, entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from state courts, and for

other purposes," and that the clerk of the said state court above named has refused to the said petitioner for the removal of said cause a copy of the record therein, though his legal fees therefor were tendered by the said petitioner:

You, therefore, are hereby commanded that you forthwith certify, or cause to be certified, to the said circuit court of the United States for the district of , a full, true and complete copy of the record and proceedings in the said cause, in which the said petition for removal was filed as aforesaid, plainly and distinctly, and in as full and ample a manner as the same now remain before you, together with this writ; so that the said circuit court may be able to proceed thereon and do what to them shall appear to them of right ought to be done. Herein fail not.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court, and the seal of the said circuit court hereto affixed, this the day of , A. D. 18 .

, Clerk of said circuit court.

FORMS IN CRIMINAL CASES.

FORM No. 185.

Order for grand jury.

UNITED STATES OF AMERICA, DISTRICT OF . } ss:

In pursuance of the authority in me vested, I do hereby order and appoint that a grand jury be drawn and summoned to serve in the circuit court of the United States of America in and for the district of , at a session of said court, to be held at the court-house in , on the day of , 18 , and that a venire issue to marshal therefor.

, Judge [or justice].

FORM No. 186.

Precept to marshal for grand and petit jurors.

The President of the United States of America to the marshal of the United States for the district of , *Greeting:*

We command you that you cause to come before a circuit court of the United States for the district of , to be held at , in the city of , in the said district of , on the day of , at o'clock in the forenoon, twenty-four good and lawful men of your district, to inquire for the United States, and the body of the said district, and to do and receive all those things which, in behalf of the United States, shall then and there be enjoined them; and also all the prisoners then and there being in any or either of the jails of said district, with their attachment and all other muniments in anywise concerning those prisoners; and likewise thirty-six free and lawful men resident within the district of , of the age of twenty-one years and upwards and under sixty years old (who are

at the time assessed for personal property belonging to them in their own right to the amount of two hundred and fifty dollars, or who shall have a freehold estate in real property in the said district belonging to them in their own right or in the right of their wives, to the value of one hundred and fifty dollars), by whom the truth of the matter shall be better known and inquired into, and who are in no wise of kin to the plaintiffs or defendants between whom the several issues joined are to be tried, nor to those prisoners.

And you the said marshal and your deputies, in your and their proper persons, shall then and there attend to do all those things which to your and their offices appertain to be done in that behalf, and have you then there the names of those jurors and those prisoners, and this writ.

Witness the honorable , Chief Justice of the Supreme Court of the United States, at the city of , in the said district of , this day of , in the year of our Lord one thousand eight hundred and , and of the independence of the United States the .

G. F., U. S. district attorney.

H. J., Clerk.

Form No. 187.

Capias or bench warrant.

The President of the United States of America to the marshal of the district of , *Greeting:*

We command you that you arrest , if shall be found in your district, and that you safely keep so that you may have body before the circuit court of the United States of America for the . district of , to be held at , in the second circuit, in and for the said district of , before the judges of the same court, on the day of next, to answer unto the United States on an indictment pending and on file against him for , as will more fully appear by reference to the said indictment, and that you also have then and there this writ.

[L. S.] Witness, etc.

, Clerk.

Form No. 188.

Common frame of indictment.

Circuit [or district] court of the United States of America for the district in the circuit, begun and held at the city of , within and for the district and circuit aforesaid, on the [state the day and date of the beginning of the term], in the year one thousand eight hundred and eighty- , and continued by adjournment from said day to and including the day of [the day of the finding and presentment of the indictment], in the year one thousand eight hundred and eighty- .

District of , *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid, on their oath do present that A. B., late of , in the county of , in the district and circuit aforesaid, merchant [or yeoman, or mariner, or as the case may be], heretofore, to wit, on the day of , in the year one thousand eight hundred and eighty- (1), at the district of and within the jurisdiction of this court, did [here insert words charging the offence according to the facts of the case, and conclude as follows] (2) against the peace of the said United States and their dignity, and against the form of the statute of the United States in such case made and provided.

G. F., United States district attorney.

ENDORSEMENT.

A true bill. K. L., Foreman of the grand jury.

Form No. 189.

Indictment for offence on the high seas.

[The form of the commencement of the indictment may be as in Form No. 188 to (1), and then proceed as follows]: on the high seas, within the admiralty and maritime jurisdiction of the said United States, and out of the jurisdiction of any particular state and within the jurisdiction of this court, in and on board a certain vessel, to wit, the ship called the Lena [or a vessel the name whereof is to the jurors aforesaid unknown], the same being then and there owned by and belonging in whole or in part

to a citizen or citizens of the United States, to wit, E. F. [and G. H.], late of the district aforesaid [or to the jurors aforesaid unknown], did [here insert proper charge of the offence as required by the circumstances of the case, and conclude as in Form No. 188 from (2)].

Form No. 190.

Indictment for offence committed at a place ceded to the United States.

[Commence same as in Form No. 188 to figure (1), then proceed] to wit, within the navy yard in the city of Philadelphia, in the district aforesaid, the site of which said navy yard had been before the said day of , in the year last aforesaid, ceded to the United States, and which said navy yard was on the last-mentioned day a place under the sole and exclusive jurisdiction of the said United States, and out of the jurisdiction of any particular state and within the jurisdiction of this court. [Here insert words charging the offence according to the facts and circumstances of the case, and conclude as in Form No. 188. If other counts are necessary or desirable, add as follows :]

Second count. And the jurors aforesaid, on their oath aforesaid, do further present, that, etc.

Third count. And the jurors aforesaid, on their oath aforesaid, do further present, that, etc.

[Averments charging the offence, and conclude as in Form No. 188.]

Form No. 191.

Subpœna to testify.

The President of the United States of America to ,
Greeting:

We command you that all and singular business and excuses being laid aside, you and each of you be and appear in your proper persons, before the circuit court of the United States of America for the district of , in the second circuit, at , in the city of , in the said district of , on the day of , one thousand eight hundred and ,

at o'clock in the noon of the same day, to testify all and singular what you and each of you may know in a certain criminal case now depending undetermined in the circuit court of the United States for the district of , between the United States of America *v.* , defendant, on the part of the .

And this you or either of you are not to omit, under the penalty upon each and every of you of two hundred and fifty dollars.

Witness, honorable , Chief Justice of the Supreme Court of the United States, at the city of , the day of , in the year of our Lord one thousand eight hundred and .

H. J., Clerk.

FORM No. 192.

Ca. sa. on a fine imposed.

The President of the United States of America to the marshal of the district of , *Greeting:*

We command you that in default of the payment of fine imposed on , convicted at term for the offence of , you do make the same, out of the goods and chattels, lands or tenements of said or any part thereof; and if no goods or chattels, lands or tenements of the said can be found, or not sufficient to satisfy said judgment, then that you do take said , if shall be found in your district, and that you safely keep so that you may have body before the circuit court of the United States of America for the district of , to be held at , in the second circuit, in and for the said district of , before the judges of the same court, on the next, to answer unto the United States of America, and that you also have then and there this writ.

Witness the honorable , Chief Justice of the Supreme Court of the United States of America, at , in the said district of , the day of , in the year of our Lord one thousand eight hundred and sixty- , and of the independence of the said United States the .

H. J., Clerk.

G. F., Attorney.

Form No. 193.

Record of capias ad satisfaciendam.

United States circuit court, district of .

v. } Capias, etc.

Issued on order of United States attorney to imprison, etc., defendant in default of payment of fine $, imposed by order of court at term, A. D. 18 .

, Clerk.

Form No. 194.

Commitment to penitentiary.

At a session of the circuit court of the United States of America for the district of , held at the in the said district, on the day of , in the year of our Lord one thousand eight hundred and .

Present:—The honorable , judge.

United States circuit court, district of .

The United States of America } *v.* }

The prisoner, , having been indicted and arraigned, and having been tried and convicted of the offence of , the court now here, on motion of Mr. , United States attorney, does adjudge and sentence the said to be imprisoned in the at , and confined at hard labor for the term of .

And it is further ordered and adjudged that the marshal transport the said to the said , and deliver him the said to the keeper of the said , and that the said keeper detain the said prisoner according to this sentence; and that the clerk of this court immediately certify under the seal of the court, and deliver to the marshal of the district, a copy of this judgment, sentence and order, to accompany the body of the

said , and to be left therewith at the said , the said copy to be warrant and authority for the transportation and imprisonment of the said , as hereinbefore provided.

I certify the foregoing to be a true copy of an original judgment, sentence and order of the said court, as filed in my office.

Witness my hand and the seal of the said court, this day of , A. D. 18 .

[L. S.] , Clerk.

Form No. 195.

Certificates, etc., on division of opinion in a criminal cause.

At a circuit court of the United States, begun and held at the city of , for the district of , on the day of , A. D. 18 .

Present:—Hon. , judge.

Present:—Hon. , judge.

United States circuit court, district of .

v.

This is an indictment against the defendant, charging him with having at the city of , in the state of , on the day of , A. D. 18 , knowingly exercised and carried on the trade or business of a lottery ticket dealer, and with having sold and offered to sell lottery tickets without having taken out and without having a license therefor, according to the provisions of the act of Congress entitled "An act to provide internal revenue, and to pay interest on the public debt," and the amendments thereof.

The defendant demurs to said indictment and the matters therein contained, as not sufficient in law to compel him to answer the same.

The government joins in said demurrer, and it is stipulated by and between the respective parties, in writing, that the defendant may have the same benefit as if he had pleaded specially the constitution and several laws of the state of on the subject of raffling and lotteries; and had also pleaded specially that at

the several times mentioned in the indictment, he was a citizen of the said state, and exercised and carried on his business therein.

The case coming on to be argued at this term, it occurred as a question, whether the defendant could be legally convicted and punished under the said indictment, and the acts of Congress therein referred to, for the offence of carrying on, without license under the said acts of Congress, the business mentioned and described in such indictment, while the said business was unlawful and wholly prohibited by the laws of the state of , and said defendant was a citizen of and resident therein, and while said business could not be carried on by the said defendant as alleged in said indictment, without his being liable to indictment, conviction and punishment under the laws and statutes of said state, for the criminal offence of selling lottery tickets and carrying on said business in violation of said statutes of said state.

On which question the opinions of the judges were opposed.

Whereupon, on motion of the United States, by their district attorney and counsel, that the point on which the disagreement has happened may, during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court, to be finally decided, it is ordered that the foregoing statement of the pleading, etc., and the following statement, made under the direction of the judges, be certified, according to the request of the United States, by their attorney and counsel, and the law in that case made and provided, to wit: That the sale of lottery tickets and the carrying on of the business mentioned in the indictment as therein stated was then and there, under the constitution and laws of the state of , a criminal offence; and now and for the last ten years has been a crime punishable by indictment, fine and imprisonment under the statutes of said state.

United States circuit court, district of .

At a stated session of the circuit court of the United States of America, held in and for the district of on the day of , A. D. 18 , before the honorable , judge of the said court, assigned to keep the peace of the said United States of America in and for the said district, and also to hear and determine divers felonies, misdemeanors and other offences against the said United States of America, in the said district com-

mitted, good and lawful men of the said district, then and there sworn and charged to inquire for the said United States of America, and for the body of said district, do upon their oaths present that , now or late of , in the county of , with force and arms, etc., to wit, at , in the county of , in the said district of , and within the jurisdiction of this court, heretofore, to wit, on the day of , in the year of our Lord one thousand eight hundred and sixty , and on divers days and times between that day and the finding of this indictment, did knowingly, feloniously and unlawfully exercise and carry on the trade or business of , for the exercising and carrying on of which trade or business a license then was and is required, and without having taken out, and without having a license therefor, according to the provisions of the act of the Congress of the United States, entitled "An act to provide internal revenue, and to pay interest on the public debt," and the amendments thereof, against the statute of the United States of America in such case made and provided, and against the peace of the said United States of America, and their dignity.

, U. S. attorney, district of .

United States circuit court, district of .

v. }

And now comes the above-named defendant in open court, and having heard the said indictment read, saith that the said The United States of America ought not further to impeach or prosecute him, the said defendant, touching the premises whereof he is by the said indictment accused, because he says that the said indictment, and the matters therein contained, are not sufficient in law to compel him, the said defendant, to answer the same; and that no process upon the said indictment ought, by the law of the land, to be issued against him, the said defendant; and this he is ready to verify.

Wherefore he prays judgment of the court here, and that he may be dismissed and discharged of the said indictment.

, Attorney for defendant.

United States circuit court, district of .

v.

And , district attorney of the United States for the district of , who prosecutes for the said The United States of America in this behalf, saith that the said indictment, and the matters therein contained, in manner and form, as the same are above stated and set forth, are sufficient in law to compel the said to answer the same. And the said The United States of America is ready to verify, as the court here shall direct and award.

Wherefore, inasmuch as the said hath not answered to the said indictment, nor hitherto in any manner denied the same, the said The United States of America pray judgment, and that the said may be convicted of the premises in the said indictment specified.

G. F., U. S. attorney, district of .

United States circuit court, district of .

v.

It is hereby stipulated that upon and under the demurrer of the defendant interposed to the indictment in this case, the defendant may have the same benefit as if he had pleaded specially the constitution and several laws of the state of on the subject of , and had also pleaded specially that at the several times mentioned in the indictment he was a citizen of the said state, and exercising and carrying on his business therein.

G. F., U. S. attorney.
H. J., Defendant's attorney.

United States circuit court, district of .

Certified to the Supreme Court of the United States, pursuant to the statute.

Witness my hand and official seal at , this day of 18 .

[L. S.] , Clerk.

COMMISSIONERS' FORMS.

Form No. 196.

Order for the appointment of a commissioner.

Circuit court, district of .

Present:—The honorable , judges.

In the matter of the appointment of A. B. as United States commissioner.

It is hereby ordered that A. B., of , in said district, be and he hereby is appointed a commissioner of this court, to take affidavits and acknowledgments of bail in civil causes depending in the courts of the United States, and to execute and perform all the duties and exercise all the powers conferred upon commissioners appointed by this court, by the various provisions of the statutes of the United States now or hereafter in force relating to the same.[1]

Form No. 197.

Complaint—common form.

United States of America, } *sct.*
District of . }

Before me, Adam Burrows, a commissioner of the United States in and for said district, personally comes Edgar A. Thomson, who, being sworn, on his oath says that he has good cause to believe that E. Ford, late of said district, on the day of , A. D. 18 [here insert the place where the crime or offence was committed and a description of the accusation], contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Edgar A. Thomson.

Subscribed and sworn to before me this day of .

Adam Burrows, Commissioner U. S. circuit court in and for said district.

[1] An official oath should be taken and made in the usual form by the commissioner, and filed with the clerk of the court.

Form No. 198.

Complaint for breaches of the peace.

UNITED STATES OF AMERICA, DISTRICT OF . } *sct.*

Before me, , a commissioner of the circuit court in and for said district, personally comes George Payne, who, being duly sworn, upon his oath says that he has just cause to fear and does fear that E. Frainey, of said district, will [here state the facts and violence threatened] contrary to the constitution and laws of the United States, and against the peace and dignity thereof.

George Payne.

Sworn to and subscribed before me this day of , A. D. 18 .

James R. Lane, Commissioner U. S. circuit court in and for said district.

Form No. 199.

Warrant to apprehend.

The President of the United States of America to the marshal of the United States for the district of , and to his deputies, or any or either of them:

Whereas complaint on oath hath been made to me charging that did on or about the day of , in the year one thousand eight hundred and eighty- , at , in said district [here state the offence complained of]:

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said , and bring bod forthwith before me to answer the said complaint, and be dealt with according to law for the said offence.

Given under my hand and seal this day of , in the year of our Lord one thousand eight hundred and eighty- .

[L. S.]

, Commissioner of the circuit court of the district of .

Approved, , United States attorney.

Form No. 200.

Return of marshal endorsed on back of warrant.

Received this warrant on the day of , 18 , at , and executed the same by arresting the within-named at on the day of , 18 , and have h bod now in court, as within I am commanded.

, U. S. marshal.

Per , Deputy. day of , 188 .

Form No. 201.

Subpœna.

United States of America, }
district of . }

The President of the United States to the U. S. marshal for the district of , *Greeting:*

You are hereby commanded to summon , if they be found in your district, to be and appear before me, , a commissioner of the United States for the district of , at my office in , state of , on the day of , A. D. 18 , at o'clock M., to testify in a cause before the said commissioner pending, wherein the United States of America is plaintiff, and defendant , on the part of the . Hereof fail not at your peril.

Witness my official signature, at , this day of , 18 .

, United States commissioner for district of .

Form No. 202.

Return by marshal.

This subpœna came into my hands for service on the day of , A. D. 18 , and served the same on each of the within-named witnesses, as follows:

On , 18 , at
On , 18 , at
On , 18 , at
On , 18 , at
On , 18 , at

by reading the same to , and by delivering a true copy to , at the times and places above named.

, U. S. marshal.
By , Deputy.

MARSHAL'S FEES.

Mileage, miles, ... $
Service on . . . . . .
copy, ...

$

FORM No. 203.

Recognizance of prisoner pending examination.

UNITED STATES OF AMERICA, DISTRICT OF . } *ss:*

Be it remembered that on this day of , A. D. 18 , before me, George Weaver, a commissioner of the circuit court of the United States in and for said district, personally comes Edgar Finley, as principal, and George Manahan and Joseph Woods, as sureties, and acknowledged themselves to owe and be indebted to the United States of America as follows, that is to say, the said Edgar Finley, in the sum of dollars, and the said George Manahan and Joseph Woods, in the sum of dollars each, to be levied of their goods and chattels, lands and tenements, and to the United States rendered, if default be made in the conditions following:

The conditions of this recognizance are such that if the above-bounden Edgar Finley shall personally appear before the said George Weaver, commissioner as aforesaid, on the day of , A. D. 18 , to answer the complaint against him by one James Stivers, to wit [here insert accusation], and to submit to and

obey all orders of said commissioners, then this recognizance to be void; otherwise to remain in full force and virtue.

Edgar Finley. [L. S.]
George Manahan. [L. S.]
Joseph Woods. [L. S.]

Signed, sealed and acknowledged before me, this day of , A. D. 18 .

George Weaver,
Commissioner U. S. circuit court in and for said district.

FORM NO. 204.

Commitment pending examination.

UNITED STATES OF AMERICA, DISTRICT OF . } *ss:*

The President of the United States of America to the jailer of the county of , *Greeting:*

Whereas complaint has been made before R. A. Dean, a commissioner of the circuit court of the United States in and for said district, upon the oath of Jacob Butterby, that Charles Allen, late of said district, did, on the day of , A. D. 18 , at [here insert the place where the crime or offence was committed, and a description of the accusation], contrary to the statute in such case made and provided, and against the peace and dignity of the United States; and the said Charles Allen having been brought before the said commissioner, in pursuance of a warrant of arrest issued upon said complaint, for examination, and said examination having been postponed for the reason that [here insert the cause of the delay]. These are therefore to command you to receive the said Charles Allen into your custody, there to remain until discharged by the due course of law.

In witness whereof, I have hereunto set my hand at my office in said district, this day of , A. D. 18 .

R. H. Dean, Commissioner of U. S. circuit court in and for said district.

Form No. 205.

Recognizance of witnesses.

UNITED STATES OF AMERICA, DISTRICT OF . } ss:

Be it remembered that on this day of , A. D. 18 , before me, R. S. Stein, a commissioner of the circuit court of the United States in and for said district, personally come George McLean, James McLean, Henry Grey and William Marshall, and acknowledge themselves to owe and be indebted to the United States of America in the full and just sum of dollars, to be levied of their goods and chattels, lands and tenements, and to the said United States rendered, if default be made in the conditions following:

The conditions of this recognizance are such that if the above-bounden George McLean, James McLean, Henry Grey and William Marshall shall personally appear before the [here insert court, as "district" or "circuit"] court of the United States for the district of , on the first day of the next term thereof, to be begun and held at the city of [here insert place of holding court], in said district, then and there to testify on behalf of the United States, in cause wherein the said United States is plaintiff and Peter Metcalf is defendant, and shall not at any time be absent or depart from said court without leave, then this recognizance to be void; otherwise to remain in full force and virtue.

George McLean. [L. S.]
James McLean. [L. S.]
Henry Grey. [L. S.]
William Marshall. [L. S.]

In testimony whereof, the said obligors have hereunto set their hands and seals the day and year above written. Signed, sealed and acknowledged before me, this day of , A. D. 18 .

R. S. Steen, Commissioner of U. S. circuit court in and for said district.

FORM No. 206.

Recognizance for appearance.

UNITED STATES OF AMERICA,
DISTRICT OF ,
CITY OF . } ss:

Be it remembered that on this day of , A. D. 18 , before me, a commissioner duly appointed by the circuit court of the United States for the said district of , personally came , and jointly and severally acknowledged themselves to owe the United States of America the sum of dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such that if the said shall personally appear before the court of the United States in and for the district aforesaid, at , on the first day of the next regular term thereof, and then and there to answer the charge of , and then and there abide the judgment of the said court, and not depart without leave thereof, then this recognizance to be void, otherwise to remain in full force and virtue.

. [L. S.]
. [L. S.]

Taken and acknowledged before me on the day and year first above written.

, [L. S.]
Commissioner of the circuit court of the United States for the district of .

UNITED STATES OF AMERICA,
DISTRICT OF ,
CITY OF . } ss:

, of No. street, and , of No. street, in the city of , in said district, surety on the foregoing recognizance, being duly sworn, deposes and says that he is a freeholder in the city of , that he is worth the sum of dollars over and above all his just debts and liabilities in property subject to execution and sale, and that his property consists of .

Sworn to this day of , A. D. 18 , before me.

, [L. S.]
Commissioner of the circuit court of the United States for the district of .

FORM NO. 207.

Mittimus—common form.

The President of the United States to the marshal for district of , *Greeting:*

An order having been this day made by me that be held to bail in the sum of $ to appear at the first day of the term, A. D. 18 , of the district court of the United States for the district of , upon a charge of . He failing to give the required bail you are hereby commanded to receive and keep in your custody the said and detain until released by due course of law.

Witness my official signature at city of , this day of , 18 .

, U. S. commissioner for district of .

FORM NO. 208.

Affidavit of attendance.

UNITED STATES OF AMERICA, DISTRICT OF } *ss:*

Before me, R. W. Rhu, a commissioner of the circuit court of the United States in and for said district, personally comes George Hull, who, being duly sworn upon oath, says that he has attended the examination in the case of the United States against E. F. Franklin, charged with [here insert the charge] as a witness for the United States, and that he is entitled to fees for attendance and mileage [the distance charged for being by the usual route travelled], as follows: days at $1 50 per day, $; miles travelled at five cents per mile, $.

R. W. Rhu, Commissioner U. S. circuit court in and for said district.

FORM No. 209.

Order to pay witness fees.

UNITED STATES OF AMERICA, DISTRICT OF . } ss:

United States v. E. R. Frainey. } Charged with .

The several persons hereinafter named having attended the examination in the above cause as witnesses on the part of the United States, it is hereby ordered that the marshal pay to them the sums set opposite to their respective names, for attendance the number of days and travel the number of miles stated, to wit:

Date.	Names.	Days attendance.	Miles travelled.	Amount due.

Adam Bonbright, Commissioner U. S. circuit court in and for said district.

FORM No. 210.

Transcript of docket.

Before , commissioner of the circuit court of the United States for the district of .

United States of America v. , Att'y for U. S.

, Att'y for def't.

Affidavit and complaint of , of , taken and filed, charging that on or about the day of , A. D. 18 , at , in the district of , said , defendant herein, did .

Issued warrant for arrest of defendant to United States marshal.

Issued subpœna for witnesses to United States marshal.

Warrant returned served by arrest of said defendant at , in said district, on the day of , 18 .

Subpœna returned served on at , in said district.

Defendant present [here state what further proceedings were had in the case, and set out the evidence taken].

UNITED STATES OF AMERICA, }
DISTRICT OF . }

I, , a commissioner of the circuit court of the United States in and for said district, do hereby certify that the foregoing writing is a true transcript of the entries on my docket in the cause therein named, and that copies of the process, examination and papers in said cause are herewith returned into the court of the United States for the district of , in pursuance of law.

In witness whereof I hereunto set my hand, at my office in in said district, this day of , 18 .

, Commissioner of the circuit court of the United States for the district of .

FORM NO. 211.

Affidavit and order for examination (de bene esse) for the plaintiff.

Circuit court of the United States for the circuit and district of , or district court of the United States in and for the district of .

United States circuit court, district of .

A. B. }
v. } *ss:*
C. D. }

, being sworn, says that he is the plaintiff in the above-entitled cause; that he is advised by his counsel and verily believes that the testimony of , at present of , mariner [or as the fact may be], is material and necessary for this deponent in

the prosecution of such cause; that the said lives at , more than one hundred miles from , where the court, at which this deponent expects the said cause will be tried, is to be held [or, is bound on a voyage to sea; or, is about to go out of the district in which the said cause is pending, and to a greater distance than one hundred miles, as the deponent is informed and verily believes; or, is so aged or so infirm as to render it probable that he will not be able to attend as a witness at the trial of such cause].

And this deponent further says that, as he is informed and believes, , the above-named defendant, resides at , about miles distant from the place where the examination of the said witness is expected to be taken; and that, as he is also informed and believes, , the attorney of the said , resides at , about miles from as aforesaid.[1]

Form No. 212.

Notice of examination (de bene esse).

Circuit (or district) court, etc.
United States circuit court, district of .

A. B.
v.
C. D.

Sir, you are hereby notified that will be examined (de bene esse) before me, at , on the day of , at o'clock in the noon, as a witness for the above plaintiff, according to the statutes in such case made and provided, at which time and place you are entitled by law to be present, and to put interrogatories to the said witness.

Dated, etc.

, U. S. commissioner.

To C. D., the above-named defendant
[or E. F., attorney for the above-named defendant].

[1] Upon such application the court will make an order for the examination as requested.

Form No. 213.

Subpœna.

United States circuit court, district of .

A. B.
v.
C. D. } To

Take notice, that you are required to be examined de bene esse on the part of the , in the above-entitled cause, before me , a commissioner duly appointed by the circuit court of the United States for the district of , under and by virtue of the statutes of the United States in such case made and provided, at my office, , in the city of , on the day of , at o'clock in the noon of that day, at which time and place you are hereby required to be present and tertify.

Witness my hand and official seal, at , this day of , 18 .

, United States commissioner.

Form No. 214.

Caption for depositions to be taken de bene esse.

UNITED STATES OF AMERICA,
DISTRICT OF , } *ss:*
STATE OF , COUNTY OF .

Be it remembered, that on this day of , in the year of our Lord one thousand eight hundred and , I, , a commissioner duly appointed by the circuit court of the United States for the district of , in the circuit, under and by virtue of the statutes of the United States in such case made and provided, did call and cause to be and personally appear before me at my office, in the district of , in the state aforesaid, to testify, and the truth to say, on the part and behalf of the in a certain suit or matter of controversy, now depending and undetermined in the court of the United States for the district of , wherein .

And the said , being about the age of years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said , and he did thereupon depose, testify and say as follows, viz.:

Form No. 215.

Certificate for depositions de bene esse.

UNITED STATES OF AMERICA,
DISTRICT OF ,
STATE OF , COUNTY OF . } *ss:*

I, , a commissioner duly appointed by the circuit court of the United States for the district of , in the second circuit, under and by virtue of the statutes of the United States in such case made and provided, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, that the witness [here state the case for taking under the statute].

I further certify, that a notification of the time and place of taking the said deposition signed by me was made out and served on the , to be present at the taking of the deposition, and to put interrogatories, if he or they might think fit so to do.

I further certify, that on the day of , A. D. 18 , I was attended by , and by the witness, who of sound mind and lawful age, and the witness , by me first carefully examined and cautioned, and sworn to testify the whole truth, and the deposition by me reduced to writing in the presence of the witness and from statement, and after carefully reading the same to the witness , subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of , the same with my own hand to the court for which the same taken.

And I do further certify, that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand and seal, this day of , in the year of our Lord one thousand eight hundred and , and of the independence of the United States the .

, U. S. commissioner, circuit court of the United States for the district of , in the circuit.

Form No. 216.

Commission to take depositions in other cases.

The President of the United States of America to ,

Greeting:

Know ye, that we, in confidence of your prudence and fidelity, have appointed you commissioner , and by these presents do give you full power and authority diligently to examine upon corporal oath or affirmation , before you to be taken, and upon the interrogatories hereunto annexed, as witness on the part of the in a certain cause now pending undetermined in the circuit court of the United States of America for the district of , second circuit, wherein

And we do further empower you, to examine on the same behalf, and in like manner, any other person or persons who may be produced as witness before you; and we do hereby require you, before whom such testimony may be taken, to reduce the same to writing, and to close it up under your hand and seal directed to , as soon as may be convenient after the execution of this commission; and that you return the same, when executed as above directed, with the title of the cause endorsed on the envelope of the commission.

Witness the honorable , Chief Justice of the Supreme Court of the United States, at the city of , this day of , in the year of our Lord one thousand eight hundred and , and of our independence the .

, Clerk.

, Attorney.

Form No. 217.

Writ of habeas corpus ad testificandum.

The President of the United States of America to the marshal of [or as the case may be], *Greeting:*

You are hereby commanded that you have the body of , now in prison [or as the case may be], under your custody, as it is said, under safe and secure conduct, before, etc. [as in the subpœna], to testify the truth, according to his knowledge, in a certain case now depending, etc. [as in the subpœna], and immediately after the said shall then and there have given his testimony, that you return him to the said prison [or as the case may be], under safe and secure conduct, and have there then this writ.

Witness, etc. [as in the capias].

Form No. 218.

Commission of dedimus potestatem.

The President of the United States of America to , *Greeting:*

Know ye, that in confidence of your prudence and fidelity, you have been appointed, and by these presents you, or any two or more of you, are invested with full power and authority to examine on his corporal oath, as a witness in a case depending in the circuit court of the United States for the circuit and district of (or, in the district court of the United States in and for the district of), wherein is plaintiff and defendant, on the part of the , upon the interrogatories annexed to this commission; and, therefore, you are hereby commanded, that you, or any two or more of you, at certain days and places to be appointed by you for that purpose, do cause the said to come before you, and then and there examine him on oath upon the said interrogatories, and that you take such examination and reduce the same into writing, and return the same annexed to this writ, closed up under your seals, or the seals of any two or more of you, into the said circuit (or

district) court, before the judges (or judge) thereof, with all convenient speed.

Witness, etc. (as above).

[The interrogatories and cross-interrogatories (if any) to be annexed to the commission, and the depositions, are to be drawn up in the usual form.]

SUPREME COURT FORMS.

FORM No. 220.

Motion for leave to file a bill in the Supreme Court.

In the Supreme Court of the United States.

J. T., complainant,
v.
D. C., defendant.

Now comes the complainant in the above-entitled cause by A. B., his solicitor, and moves the court for leave to file a bill of complaint and discovery therein, against the said defendant.

A. B., Solicitor for the complainant.

FORM No. 221.

Bill for the settlement of a boundary between states.

[Title of cause as in Form No. 1.]

To the judges of the Supreme Court of the United States.

The state of Rhode Island, one of the United States of America, brings this bill against the state of Massachusetts, also one of the United States of America.

And thereupon your orator complains and says that on the 3d day of November, 1621, King James the First granted a charter to the council of Plymouth, for planting, ruling, ordering and governing New England, in America, in which were described the boundaries of the territory so granted, as follows: [Here describe the boundaries.]

That afterwards, to wit, on the 4th of March, 1629, King Charles the First incorporated by letters patent "The Governor and Company of Massachusetts Bay, in New England," and the council at Plymouth conveyed to them by deed the lands above described.

Copies of said charters and deed are hereto annexed, marked

A, B, C, respectively, and your orator prays that they may be made a part hereof, as your orator will be prepared and prove the same.

Your orator further states that afterwards, on the 8th day of July, 1763, King Charles the Second, by letters patent, granted a charter of incorporation to William Brenton, John Coddington and others, by the name of "The Governor and Company of the English Colony of Rhode Island and Providence Plantations, in New England, in America;" and granted and conferred to the corporation, by letters patent, all that part of New England, in America, containing, etc., bounded on the north or northerly by the aforesaid south or southerly line of Massachusetts colony or plantation, etc.

Your orator further states that the province and colony of Massachusetts Bay, and of Rhode Island and Providence Plantations, thus established, continued under the charters and letters patent aforesaid, with the boundary line between them as aforesaid, unchanged until the 4th day of July, 1776, when with their sister colonies they became independent states of the Union.

Your orator further states that the true boundary line between the state of Rhode Island and Providence Plantations, and the commonwealth of Massachusetts, by virtue of the charters aforesaid from the English Crown, is a line run east and west three miles south of Charles river, or any or every part thereof.

Your orator further states that the commonwealth of Massachusetts holds possession to a line eight miles south of the Charles river, or any part thereof, and one that does not run east and west, but south of a west and north of a northeast course; that the territory between this line and the one above described belongs to the state of Rhode Island; and that the defendant unjustly withholds the possession thereof from her and exercises acts of sovereignty over it.

Your orator further states that in consequence of various disputes and controversies about the boundary between the two colonies, and subsequently between said states, numerous efforts were made to adjust the same; that about the year commissioners were appointed by the legislatures of said colonies respectively for the purpose of ascertaining and settling said boundary, but they were never able to agree upon or settle the same.

Your orator further states that the defendant herein claims that the boundary line was settled and adjusted by said commissioners acting for the two colonies and under the authority of the colonies respectively, and that this settlement has been acquiesced in by the plaintiff. But your orator states that there were errors in the proceedings of said commissioners; that they were misinformed and mistaken as to a monument alleged to have been set up, long anterior to the appointment of said commissioners, by Nathaniel Woodward and Solomon Caffrey, and which they fixed upon and assumed to be on the boundary line three miles south of any part of Charles river, without any actual survey or measurements, etc.; that the line thus fixed upon was in fact eight miles south of any part of Charles river, and has always been objected to and resisted by the complainant, and never acquiesced in as the true boundary line between said states; that the agreement of the commissioners was not accepted or ratified by the complainant; that no stake or monument existed on said line as assumed by said commissioners; and that she never admitted any line as the true boundary, except the one called for by the charters aforesaid.

Wherefore the complainant prays that the said defendant may be required to answer the matters set forth in this her bill; that the northern boundary line between the complainant and the state of Massachusetts may, by the order and decree of this honorable court, be ascertained and established; that possession and rights of jurisdiction and sovereignty to the whole tract of land, with the appurtenances mentioned, described and granted in and by the said charter or letters patent to the said colony of Rhode Island and Providence Plantations, hereinbefore set forth, and running on the north, by an east and west line drawn three miles south of the waters of said Charles river or of any and every part thereof, may be restored and confirmed to the complainants; that the complainants may be quieted in the full and free enjoyment of her possession, jurisdiction and sovereignty over the same, and the title, possession, jurisdiction and sovereignty of Rhode Island and Providence Plantations, over the same, be confirmed and established by the decree of this court; and that the complainants may have such other and further relief in the premises as to the court shall seem meet and consistent with equity and good conscience.

May it please your honors to grant unto your orator a writ of

subpœna under the seal of this honorable court, directed to the governor and attorney-general of the state of Massachusetts, commanding them, on a day certain to be named and under a certain penalty, to be and appear in this honorable court, then and there to answer, on behalf of said state, all and singular the premises, and on behalf of said state stand to perform and abide such further order, direction and decree as may be made against said state.

And your orator will ever pray, etc.

A. B., Solicitor for complainant.

C. D., Of counsel.

Form No. 222.

Subpœna in a suit by one state against another.

The President of the United States to the governor and attorney-general of the state of , *Greeting:*

For certain causes offered before the Supreme Court of the United States holding jurisdiction in equity, you are hereby commanded and strictly enjoined that, laying all matters aside and notwithstanding any excuse, you personally be and appear on behalf of the people of said state of , before the said Supreme Court holding jurisdiction in equity, on the first Monday in next, at the city of Washington in the District of Columbia, being the present seat of the national government of the United States, to answer concerning things which shall there and then be objected to said state, and to do further, and receive on behalf of said state, what the said Supreme Court holding jurisdiction in equity shall have considered in this behalf; and this you may in no wise omit, under the penalty of five hundred dollars.

Witness the honorable , Chief Justice of the said Supreme Court, at Washington city, this day of , 18 .

Signed by the clerk of the Supreme Court.[1]

[1] This form was prepared by the court in the case of New Jersey *v.* New York, 4 Pet. 467.

Form No. 223.

Return of service of subpœna on a state.

The within subpœna was served on J. K., governor of the state of Massachusetts, at on the day of , 18 ,[1] by delivering to and leaving with him a copy thereof, and at the same time showing him the original with the seal of the court attached; also on L. M., attorney-general of said state, at on the day of , 18 , by delivering to him a copy thereof, and at the same time showing him this original with the seal of the court attached.

Dated , 188 . N. O., U. S. marshal.

Form No. 224.

Precipe for appearance by a solicitor.

In the Supreme Court of the United States.

The State of Rhode Island, complainant,
v.
The State of Massachusetts, defendant.

The clerk of this court will please enter my appearance as solicitor for the defendant in the above-entitled cause.

Dated , 18 . Yours, etc.,
S. T., Solicitor for the defendant.[2]

Form No. 225.

Demurrer for want of jurisdiction.

In the Supreme Court of the United States.

The State of Rhode Island, complainant,
v.
The State of Massachusetts, defendant.

Now comes the defendant in this cause and demurs to the bill filed herein, and asks that the same be dismissed, for the following reasons:

[1] In case of service by copy here insert: "by leaving a copy thereof at the dwelling house [or usual place of abode] of the said , with , an adult person, who is a member of [or resident in] his family." See Equity Rule 13.

[2] The appearance may be a special one; as to object to the jurisdiction of the court: Rubber Co. *v.* Goodyear, 9 Wall. 807. And it has been held that the filing of a demurrer to a bill was sufficient appearance, without a formal entry of it: New Jersey *v.* New York, 6 Pet. 323.

1. It does not appear from the bill that the parties before the court are such as to give the court jurisdiction of the same.

2. It does not appear from the bill that the matter in question or controversy is of such a judicial nature as to authorize the court to take cognizance of it.

3. It appears from the bill that the controversy relates solely to the jurisdiction and sovereignty of the state in its political capacity, and presents no question of private rights of persons or property for judicial determination.

A. B., Solicitor for defendant.

FORM NO. 226.

Certificate to a demurrer.

I hereby certify that in my opinion the foregoing [or within or above] demurrer is well founded in point of law.

A. B., Solicitor and of counsel for defendant.

FORM NO. 227.

Affidavit to demurrer in Supreme Court.

UNITED STATES OF AMERICA,
SUPREME COURT. } *ss:*

I, C. D., being duly sworn, depose and say that I have read the foregoing demurrer to the bill of complaint in said suit in which I am defendant [or one of the defendants], and that said demurrer is not interposed for the purpose of delaying said suit.

C. D.

Subscribed and sworn to before me this day of , 18 .

E. F., Clerk of said court.

FORM NO. 228.

Motion to dismiss for want of jurisdiction.

In the Supreme Court of the United States.

The State of Rhode Island, complainant,
v.
The State of Massachusetts, defendant.

Now comes the defendant and moves the court to dismiss the bill herein for want of jurisdiction, as apparent from the bill:

1st. Because it therein appears that the claim relates to an antiquated controversy between colonies, previous to the formation of the government.

2d. Because there is no legislative provision or law in force to direct or regulate the process, forms of proceeding, judgment or execution, or to authorize any action by the court in the premises.

3d. Because the nature of the suit is political in its character, brought by a sovereign for the restitution of sovereignty of disputed territory.

A. B., Solicitor for defendant.

FORM NO. 229.

Bill by one state against another to settle the boundary; another form.

To the Supreme Court of the United States:

The state of Missouri, by Robert A. Hatcher, her agent and attorney, duly appointed and commissioned in pursuance of law, states that a controversy has arisen between said state and the state of Kentucky respecting the boundaries of said states, and the said state of Missouri complains that said state of Kentucky, since the first of January, A. D. one thousand eight hundred and fifty-seven, has unlawfully claimed and exercised jurisdiction over Wolf island, an island in the Mississippi river, forming part of the territory of said state of Missouri; that said states are severally bounded at the point in question by the main channel of said river, and the said island was at the time said boundaries were fixed, and still is, on the western or Missouri side of said channel.

Wherefore complainant prays that said state of Kentucky may be made a defendant to this bill, and permitted to answer the same; that upon a final hearing of the cause, the boundary herein claimed may be ascertained and established by the decree of this court, and that the rights of possession, jurisdiction and sovereignty of said state of Missouri thereto be quieted, and the defendant forever enjoined and restrained from disturbing said complainant, her officers or people in the full possession and enjoyment of the same; and the complainant prays such other and further relief as the nature of the case requires and to equity belongs; and complainant will ever pray, etc.

R. A. Hatcher, Agent and solicitor for complainant.

Form No. 230.

Bill to restrain the use of a trade mark.

[Caption and title of cause as in Form No. 1.]

To the judges of the Supreme Court of the United States:

P. F., resident of the city of New York, but an alien and a consul of her Britannic Majesty for the city of New York, duly appointed and accredited by the government of Great Britain, and duly recognized as such by the government of the United States of America, brings this bill against D. C., of F., in the state of Massachusetts, and a citizen of that state.

And thereupon your orator complains and says that for many years past in manufacturing cotton thread at Leicester, in that part of the United Kingdom of Great Britain and Ireland called England, and vending the same in large quantities not only in England but throughout the United States, and particularly in the city of B., in said state. That their said thread is, and for many years has been, put up for sale on spools, and labelled on the top of the spools "Taylor's Persian Thread," in a circle, in the centre of which is the number of the thread, and on the bottom of some of the spools, "J. Taylor, Leicester," and on the bottom of others, "J. Taylor," with the number of yards of thread on each spool; each spool usually containing two hundred yards or three hundred yards of thread, and the spools containing two hundred yards being black, and labelled "200 yards," on the bottom of the spools, and those containing three hundred yards being red, and labelled "300 yards," on the bottom of the spools. And on the centre of some of the same labels on the bottom of each spool is stamped the symbol or print of the head and forepart of a lion rampant; and on the centre of other of said labels is stamped a coat-of-arms, the shield whereon contains a lion rampant, and over the same three balls, with the motto, "*In Deo confido.*" And your orators further say that their spools so marked, stamped, colored or labelled as aforesaid are put up for sale in paper envelopes, each containing one dozen spools; which envelopes are prepared and stamped by your orator for said purpose, and some of said envelopes bear in raised letters stamped on them the inscription, "The Persian Thread made by J. Taylor is labelled on the top of each spool Taylor's

Persian Thread, and on the bottom, J. Taylor, Leicester. The above is for the protection of buyers against certain piratical articles of inferior quality, fraudulently labelled with the name of Taylor." And on other of said envelopes is stamped a coat-of-arms representing a shield, the upper division of which is gilt, and contains three balls, and the lower division thereof is red, and contains the effigy of a lion rampant, with the motto under the same, "*In Deo confido.*" Your orators further show unto your honors that their said thread has been and is manufactured of various sizes and numbers, to meet the wants of the trade; and by means of the care, skill and fidelity with which your orators have conducted the manufacture thereof for a series of years, their said thread has acquired a great reputation in the trade throughout the United States, and large quantities of the same are constantly required from your orators to supply the regular demand for the consumption of the country. And your orators have established agencies for the sale thereof to the wholesale dealers and jobbers in the cities of B., N. Y., P. and N. O., and in addition thereto your orators employ B. W., now residing in said city of N. Y., as their general agent for the United States, in relation to the sale of the said spool sewing cotton thread; and a mercantile firm of H. & C. are the agents of your orators for the sale of the same in the city of B. And your orators further show unto your honors that their said thread is known and distinguished by the trade and the public as "Taylor's Persian Thread," and that your orators were the original manufacturers thereof, and the first who introduced the same to the public. That your orators' said general agent, on or about the first day of March last past, hearing that complaints were made of the quality of "Taylor's Persian Thread," proceeded to investigate the cause of said complaint, and thereupon ascertained that a spurious article of spool sewing cotton thread was offered for sale by sundry jobbers in the said city of B., as and for your orators' "Persian Thread," and that such complaints had arisen from the fraudulent imposition of such spurious article upon the public. Your orators further show unto your honors that their said agent further ascertained, upon inquiry, and your orators charge the facts to be, that the said spurious thread so sold and offered for sale in the said city of B., or some of it, was furnished to said jobbers by said D. C., either by

him personally or by one F. D. E., of B., his agent in that behalf, and your orators are informed and believe that the said D. C. has sold the said thread, put up, marked and designated as aforesaid, in the said city of B.; that the said D. C., disregarding the rights of your orators, and fraudulently designing to procure the custom and trade of persons who are in the habit of vending or using your orators' said "Persian Thread," and to induce them and the public to believe that his said thread was in fact manufactured by your orators, has engaged extensively in the manufacture of sewing cotton thread, and caused the same to be put up for sale in envelopes and on spools similar to those used by your orators, and so colored and stamped and labelled as to resemble exactly the said spools and envelopes used by your orators. And the said spool sewing cotton thread prepared by the said D. C. and sold by him, and which he is engaged in selling as aforesaid, is an exact imitation of the same article which your orators had been manufacturing as aforesaid, and selling in the United States for many years before the said D. C. commenced his said fraudulent imitation thereof. And the said spurious article, although inferior in quality to the genuine Persian Thread manufactured by your orators, can only be distinguished therefrom, so exact is the said D. C.'s imitation as aforesaid, by a careful examination of its quality and by a falling short in the number of yards contained on each spool from the number marked thereon as the contents thereof. And that the general appearance of the spurious article is the same as that of your orators' genuine thread, and well calculated to deceive those dealing in the purchase and sale thereof. Your orators further show unto your honors that their said general agent has obtained specimens of the said spurious Persian Thread, so sold by the said D. C. That in some of the specimens thus obtained the thread is put upon black spools, and in other of said specimens the thread is put upon red spools; the said red and black spools are of the same size and appearance with those used by your orators; on the top of which spurious spools, that is pasted round a paper label, partly gilt, are printed in the circle the words "Taylor's Persian Thread," and in the centre of the circle the number of the thread; and on the other end on the bottom of such spurious spools there is pasted a round paper label, on some of which are printed in a circle the words "J. Taylor, Leicester," and on others, "J. Taylor," with the num-

ber of yards of thread on the spools, and across others of the labels on said black spools the letters and figures "200 yds.," and on said red spools the letters and figures "300 yards" are printed, and in the centre of the said labels there is impressed the figure or symbol of the head or forepart of a lion rampant. And in other of said specimens the thread is put on spools corresponding in all particulars to those herein just before described, except that the labels on the bottom thereof bear a coat-of-arms, the centre of the shield whereof contains a lion rampant, with three balls over the same, and with the motto under, "*In Deo confido.*" Your orators have also obtained specimens of the envelopes in which said D. C.'s spurious thread is put up and sold by him or his agents, which bear the same inscriptions, letters and stamps that those used and employed by your orators bear. And in all these particulars of the labels on each end of the said spurious spools of thread and the envelopes in which they are put up, they are exactly like the envelopes and the labels on the respective ends of the spools of your orators' genuine Persian Thread, as hereinbefore stated. Your orators further show unto your honors that they have not yet ascertained the extent to which the said D. C. has carried his fraudulent imitation and sale of your orators' said thread. But your orators' said general agent has found the same offered for sale to the trade in at least six wholesale or jobbing houses in the city of B. as Taylor's Persian Thread, from which your orators believe, and they therefore charge, on their belief, that the said D. C. has been and is engaged in selling his said fraudulent and spurious imitation of your orator's Persian Thread to a large extent in various places in the United States, with intent that the same should circulate and be received and used by the public as Taylor's genuine Persian Thread. And your orators further show unto your honors that the fraudulent and inequitable conduct of the said D. C. is not only injuring them in the sales of their said genuine Persian Thread and the profits they would otherwise reasonably make thereon, but, by the inferior quality and false measure of the said spurious Persian Thread, is greatly prejudicing the reputation of your orators' Persian Thread in the market, and unless the said imitation is discontinued or prevented, will ultimately destroy the character and standing of the genuine article. And your orators also charge that the said spurious thread is a fraud and deception upon the citizens of

the state of Massachusetts and of the United States, who purchase the same believing it to be the genuine article manufactured by your orators. In consideration whereof, and forasmuch as your orators are remediless in the premises at common law, and cannot have adequate relief save by the aid and interposition of this court; to the end, therefore, that the said D. C., if he can show why your orators should not have the relief hereby prayed, and upon his corporal oath, and according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answers make to the interrogatories hereinafter numbered and set forth; and the said D. C. and his attorneys, solicitors, counsellors, agents and servants may be enjoined and restrained from manufacturing, selling or offering for sale directly or indirectly, any spool cotton sewing thread manufactured by him, or any person other than your orators, under the denomination of "Taylor's Persian Thread," or on spools with the words "Taylor's Persian Thread," or "J. Taylor, Leicester," or "J. Taylor," printed, painted, written or stamped, or attached or posted thereon, or with your orators' said device of a lion rampant, or with their said coat-of-arms thereon; or on spools so made or having any label, printing or device thereon, in such manner as to be colorable imitations of your orators' said spool thread, usually known as "Taylor's Persian Thread," and that the said D. C. may be decreed to account to your orators for all the profits which he has made by the sale of his said fraudulent imitation of your orators' thread, and all the profits which your orators would have made on the sale of their genuine thread but for the said D. C.'s inequitable and wanton piracy of this their said name, spools and labels; and that your orators may have their costs and charges in this behalf paid by the said D. C.; and that your orators may have such further and other relief in the premises as to your honors shall seem meet, and shall be agreeable to equity and good conscience, may it please your honors to grant unto your orators a writ of injunction issuing out of and under the seal of this court, to be directed to the said D. C., his attorneys, solicitors, counsellors, agents and servants, therein and thereby commanding and enjoining him, under a certain penalty in the said writ to be expressed, according to the foregoing prayer of your orators. May it also please your honors to grant unto your orators a writ of subpœna issuing out of and under the

seal of this court, to be directed to the said D. C., commanding him on a certain day, and under a certain penalty in the said writ to be inserted, personally to be and appear before your honors in this honorable court, then and there to answer the premises, and to stand to, abide by and perform such order and decree therein as to your honors shall seem meet, and shall be agreeable to equity and good conscience.

INTERROGATORIES TO BE ANSWERED BY D. C.

1. Whether or not have you sold or manufactured in Massachusetts or elsewhere thread put upon black spools, on one end of which goods is pasted, or otherwise fastened, a circular paper label partly gilt, on which is printed in a circle the words "Taylor's Persian Thread," and in the centre thereof the number of the thread, and on the other end of which is pasted, or otherwise fastened, a circular white paper label, on which is printed the words "J. Taylor, Leicester," and across the same label "200 yds.," and in the centre of the same label there is impressed the figure or symbol of a lion rampant?

2. Whether or not have you manufactured and sold, either in Massachusetts or elsewhere, thread put upon red spools, corresponding in all respects to the black spools described in the preceding interrogatory, except in the color of the spool and in the quantity of thread thereon, and in the letters and figures "300 yds." printed across the said white paper label?

3. What number of each kind of the said spools of thread have you manufactured and sold? State the same accurately, and distinguish the kind and number of the thread, and the number of black spools and the number of red spools so sold by you since you commenced selling the same, and the times when and the places where the same have been sold.

4. What have been the profits made or realized by you on the manufacture and the sale of thread put upon spools colored, decorated and fitted up in the manner described in the first and second interrogatories?

5. To whom and what persons in particular you have sold said thread put up in the manner described in the first and second interrogatories?

6. Who is and who has been your agent in Boston for the sale of your thread put upon spools, fitted up in the manner described in the first and second interrogatories?

7. Whether or not did you admit, in an answer sworn to and filed by you in the court of chancery in and for the state of New York, to a bill of complaint therein pending, wherein the said J. T. and W. F. were complainants and yourself was defendant, that you engaged in the manufacture of sewing cotton thread, which you caused to be put up for sale on spools similar to those used by the complainants, and so colored, stamped and labelled as to resemble exactly, or as near as the same could be done, the said spools used by the complainants, and the said spool sewing cotton prepared and sold by you was an exact imitation of the same article which the complainants had been selling in the United States many years before you commenced manufacturing your thread?

8. Whether or not have you manufactured and sold in Massachusetts sewing cotton thread upon black spools and upon red spools, on one end of which is fastened a circular paper label on which is stamped a coat-of-arms, the shield whereof contains a lion rampant, and over the same three balls, with the motto under the shield, "*In Deo confido*," and around said shield is printed in some of said labels "J. & W. Taylor, Leicester," and in others, "J. & W. Taylor," with the number of yards on said spools?

9. Whether or not have you put up and sold your sewing cotton thread, colored, stamped and labelled in all or some of the modes described in this bill, in envelopes or wrappers, some bearing in raised letters the inscription, "The Persian Thread made by J. & W. Taylor is labelled on the top of each spool Taylor's Persian Thread, and on the bottom J. W. Taylor, Leicester. The above is for the protection of buyers against certain piratical articles of inferior quality, fraudulently labelled with the name of Taylor," and others bearing a coat-of-arms, the upper division of which is gilt and has three red balls thereon, and the lower division is red and has a lion rampant thereon.

C. P. & B. R. C., Solicitors.[1]

[1] This form is adapted from the form of the bill in the case of Taylor et al. *v.* Carpenter, in the circuit court of the United States for the first circuit [Massachusetts], determined in 1844; in which case a perpetual injunction was granted: 3 Story 458.

FORM No. 231.

Plea and certificate.

In the Supreme Court of the United States.

J. T., complainant,
v.
D. C., defendant.

The said , defendant, by E. F., his solicitor, comes and says that this court ought not to take further cognizance of this suit, because the complainant herein is not a consul of at the city of , as stated in his bill of complaint herein, nor was he at the time of the filing of his said bill, and this he is ready to verify.

[If the plea is of another bill pending, say: "That heretofore, and before the said complainant exhibited his bill in this honorable court, to wit, on the day of , 18 , the said complainant in the circuit court of the United States at , in the circuit, for the same matters and to the same effect, and for like cause of complaint and relief as in this his bill herein, and to which bill this defendant did then and there put in an answer, and said bill is still pending in said court and undetermined."]

Wherefore he prays judgment if the court here will take cognizance of or entertain this action.

G. F., Solicitor for defendant.

I, E. F., solicitor for the defendant in this suit, hereby certify that in my opinion the foregoing plea to the bill of complaint filed herein is well founded in point of law.

G. F., Solicitor for defendant.

FORM No. 232.

Answer in the Supreme Court.

In the Supreme Court of the United States.

J. T., complainant,
v.
D. C., defendant. } Answer.

The answer of D. C., defendant, to the bill of complaint of J. T., complainant.

The said defendant admits that the complainant is an alien and a consul of her majesty Queen Victoria, for the city of New York, duly appointed and accredited by the government of Great Britain, and duly recognized as such by the government of the United States of America; and that he or others using his name have been engaged in vending sewing cotton threads in New York and Boston; but he does not admit that is the manufacturer thereof, and he alleges that he purchases the thread and winds it on spools labelled and marked as in the bill set forth, and encloses it in envelopes as described in the bill.

The defendant further admits that the threads vended by the complainant have acquired a good reputation in the United States, but he avers that the same had fallen off before the complainant began to deal in and put up said threads, and the defendant has been informed and believes that during the last three or four years large quantities of thread have been spooled and labelled as "Taylor's Thread" or "Persian Thread" in England by persons other than complainant, and exported to the United States as the thread of complainant so publicly that the complainant knew the same, or was legally affected with notice thereof.

Defendant further avers that his thread is as good as that of the complainant. He admits that he has put up the thread on black spools labelled as described in the bill of complainant, and in envelopes similar to those described therein and with raised letters thereon; but he avers that he never put up thread in envelopes bearing a coat-of-arms, or on red spools bearing a coat-of-arms, or on spools labelled 300 yards, or on any spools bearing such a mark, or the figure of the head and forepart of a lion rampant.

He further avers that he consigned all his threads to E. for sale as his agent, and always instructed him to inform purchasers that they were of domestic manufacture; that he is informed by the said E., and believes, that he never pretended that the said threads were those vended by complainant; that he, the said defendant, never sold any threads under such pretence, but on the contrary he and his said agent always informed purchasers that the threads were of domestic manufacture, and not made or put up by the complainant.

The defendant further avers that the complainant is an alien, and has no exclusive right of vending spool cotton thread put up, labelled and marked in the manner set forth in the bill; that the

defendant had full right and authority to manufacture threads and put it up on spools, and with labels in all respects similar to those of the complainant, and to sell the same in the United States without becoming liable to the plaintiff for so doing. And this defendant further answering denies that any citizens of the United States have been injured by his sale of said threads as aforesaid.

And the defendant further answering states that for six or seven years before and ever since he commenced putting up threads as aforesaid, divers persons other than the complainants or defendants have manufactured and put up thread on spools, colored, labelled, stamped and enclosed in the same manner as alleged by the complainant for sale in the United States, so publicly that the complainant or his agents either knew the same or were affected with notice thereof; that according to the custom of trade the defendant is not liable or accountable to the complainant, or to any foreign manufacturer or vender, for using in the United States their trade marks, numbers, labels, names, stamps, figures, designs or emblems.

The defendant in answer to the first interrogatory of said bill says that he has manufactured and sold in Massachusetts thread upon black spools of the description contained in said interrogatory, except, etc.

In answer to the second interrogatory he says that he has not manufactured or sold thread upon red spools marked as described in said interrogatory, etc.

In answer to the third interrogatory he says that he has manufactured and sold black spools marked, numbered and labelled as aforesaid, etc.

In answer to the fourth interrogatory he says that his profit upon the spool thread manufactured and sold, colored and marked as aforesaid, has been, etc.

In answer to the fifth interrogatory he says that he has sold said thread to, etc.

In answer to the sixth interrogatory he says that his sole agent in Boston for the sale of thread as aforesaid was E., etc.

In answer to the seventh interrogatory he says that he has not, etc.

In answer to the eighth interrogatory he says that he has not, etc.

And the defendant further answering denies that the said com-

plainant is entitled to the relief or any part thereof in the said complaint demanded. And the defendant prays the same advantage of his aforesaid answer as if he had pleaded or demurred to the said bill of complaint. And the defendant prays leave to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

E. F., Defendant.

O. P., Solicitor for defendant.

FORM NO. 233.

Form of verification of answer in the Supreme Court.

UNITED STATES OF AMERICA,
SUPREME COURT. } *ss:*

C. D., being duly sworn, deposes and says that he is the defendant named in the foregoing answer; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he verily believes it to be true.

C. D.

Subscribed and sworn to this day of , 18 , before me.

E. F., United States commissioner.

FORM NO. 234.

Assignment of errors in the Supreme Court of the United States.

v. } In error.

Of December term, in the year of our Lord one thousand eight hundred and .

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said , by his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said

to have or maintain his aforesaid action thereof against the said ; there is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said against the said , whereas by the law of the land the said judgment ought to have been given for the said against the said , and the said prays the judgment aforesaid may be reversed, annulled and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, etc.

, Attorney for plaintiff in error.

FORM No. 235.

Joinder in error.

Supreme Court of the United States.

v. } In error.

And afterwards, to wit, on the first Monday of December, in December term, in the year of our Lord one thousand eight hundred and , the said , by his attorney, freely comes here into court, and says that there is no error, either in the record and proceedings aforesaid or in the giving of the judgment aforesaid; and he prays that the said Supreme Court of judicature, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error; and that the judgment aforesaid, in form as aforesaid given, may be in all things affirmed, etc.

, Attorney for defendant in error.

FORM No. 236.

Precipe for appearance.

Supreme Court of the United States, term, 18 , No.

T. T., complainant,
v.
D. C., defendant.

The clerk will enter my appearance as counsel for defendant.

G. F.

FORM NO. 237.

Receipt for record.

Supreme Court of the United States, term, 18 , No. .

T. T., complainant,
v.
D. C., defendant.

Received from the clerk a copy of the record, as counsel for defendant.

G. F.

FORM NO. 238.

Bond for clerk's fees.

[Title of cause.]

Know all men by these presents that we, , of , in the county of and state of , and , of , in the county of and state of , are held and firmly bound unto William T. Otto, clerk of the Supreme Court of the United States, in the full and just sum of two hundred dollars, current money of the United States, to be paid to the said William T. Otto, his heirs, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this day of , in the year of our Lord one thousand eight hundred and .

Whereas, lately, at , in a suit depending in said court, between , a judgment was rendered against the said , and the said having obtained to remove the said cause to the Supreme Court of the United States, and filed a transcript of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States, to reverse the in the aforesaid suit.

Now, the condition of the above obligation is such that if the said obligors shall well and truly pay, or cause to be paid, to the said William T. Otto, his heirs, executors, administrators or assigns, all such fees as shall accrue to him, the said William T. Otto, clerk as aforesaid, and charged to the said in the prosecution

of the said , then the above obligation to be void; otherwise to remain in full force and virtue.

[L. S.]

Sealed and delivered in the presence of [L. S.]

[The party (plaintiff in error or appellant) should not join in the bond, as he is bound without it.]

I, , of the court of the United States for the district of , do hereby certify that the within-named obligors are known to me to be perfectly good and responsible for the within-named amount.

, Judge.

FORM No. 239.

Writ of error to a state court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the , *Greeting:*

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between , wherein was drawn in question the validity of a treaty of [or statute of, or an authority exercised under] the United States, and the decision was against its validity [or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission], a manifest error hath happened, to the great damage of the said , as by complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this

behalf, do command you, if judgment therein be given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the Monday of next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable , Chief Justice of the said Supreme Court, the Monday of , in the year of our Lord one thousand eight hundred and .

[L. S.] W. T. O., Clerk of the Supreme Court of the United States.

Allowed by .

FORM NO. 240.

Writ of error to a federal court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the court of the United States for the district of , *Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, , between , a manifest error hath happened, to the great damage of the said , as by complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the Monday of next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done

therein to correct that error what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable , Chief Justice of the said Supreme Court, this day of , in the year of our Lord one thousand eight hundred and .

[L. S.] W. T. Otto, Clerk of the Supreme Court of the United States.

Allowed by .

FORM No. 241.

Citation.

[Title of cause.]

The United States of America to , *Greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the Monday of next, pursuant to a writ of error filed in the clerk's office of the , wherein plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable , of the , this day of , in the year of our Lord one thousand eight hundred and .

FORM No. 242.

Bond on appeal.

[Title of cause.]

Know all men by these presents that we , are held and firmly bound unto in the full and just sum of to be paid to the said certain attorney, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this day of , in the year of our Lord one thousand eight hundred and .

Whereas lately at a , in a suit depending in the circuit court of , between and was rendered against the said , and the said having obtained and filed a copy thereof in the clerk's office of the said court to reverse the in the aforesaid suit [or having prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment aforesaid], and a citation having issued directed to the said , citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next.

Now the condition of the above obligation is such that if the said shall prosecute his appeal [or writ of error] to effect, and answer all damages and costs if fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of

[L. S.]

JUSTIFICATION.

UNITED STATES OF AMERICA, DISTRICT OF . } *ss:*

, being duly sworn, depose and say and each for himself saith that he is worth $ over and above all just debts and liabilities and exemptions.

[Signed by sureties.]

Sworn to this day of , 18 , before me.

, Commissioner.

Approve the within bond and the sureties thereto.

, Clerk.

FORM NO. 243.

Bond on certificate of division of opinion.

Know all men by these presents that are held and firmly bound unto W. T. O., clerk of the Supreme Court of the United

States, in the full and just sum of two hundred dollars, current money of the United States, to be paid to the said , his heirs, executors, administrators or assigns; to which payment, well and truly to be made, bind heirs, executors and administrators, jointly and severally, by these presents. Sealed with seal, and dated this day of , in the year of our Lord one thousand eight hundred and .

Whereas having filed in the Supreme Court of the United States a certificate of a division in opinion of the judges of the circuit court of the United States for the district of , in a suit depending in said court, wherein the said and for the decision of said Supreme Court in said case, agreeably to the act of Congress in such case made and provided:

Now the condition of the above obligation is such that if the said shall well and truly pay, or cause to be paid, to the said , his heirs, executors, administrators or assigns, all such fees as shall accrue to him, the said W. T. O., clerk, as aforesaid, and chargeable to the said , in the prosecution of said suit, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of [L. S.]

[Justification as in last form.]

Form No. 244.

Judgment on writ of error to state court.

[Title of cause.]

Supreme Court of the United States, term, 18 .

In error to the court of the state of .

This cause came on to be heard on the transcript of the record from the court of the state of , and was argued by counsel.

On consideration whereof, it is now here ordered by this court that the of the said court, in this cause, be and the same is hereby [state the judgment].

FORM NO. 245.

Judgment on writ to federal court.

[Title of cause.]

Supreme Court of the United States, term, 18 .

In error to the court of the United States for the district of .

This cause came on to be heard on the transcript of the record from the court of the United States for the district of , and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said court, in this cause, be and the same is hereby [state the judgment].

FORM NO. 246.

Decree on appeal.

[Title of cause.]

Supreme Court of the United States, term, 18 .

Appeal from the court of the United States for the district court of .

This cause came on to be heard on the transcript of the record from the court of the United States for the district of , and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said court, in this cause, be and the same is hereby [state the judgment].

FORM NO. 247.

Mandate to state court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the , *Greeting:*

Whereas lately, in the , before you or some of you, in a cause between and , as by the inspection of the transcript of the record of the said cause, which was brought into the Supreme Court of the United States, by virtue of a writ of

error, agreeably to the statute in such case made and provided fully and at large appears.

And whereas in the present term of , in the year of our Lord one thousand eight hundred and , the said cause came on to be heard before the Supreme Court of the United States on the said transcript of the record, and was argued by counsel. On consideration whereof [here state the decree], and the same is hereby remanded to you, the said judges of the said , in order that such proceedings may be had in the said cause, in conformity to the judgment and decree of this court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the honorable , Chief Justice of the said Supreme Court, the Monday of , in the year of our Lord one thousand eight hundred and .

W. T. O., Clerk of the Supreme Court.

COSTS.

Clerk, ... $
Attorney, ...

Taxed by

W. T. O., Clerk of the Supreme Court of the United States.

Form No. 248.

Decree of Supreme Court where no point has been duly certified on a division of opinion.

[Title of cause.]

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Mississippi, and on the point and question on which the judges of the said circuit court were opposed in opinion and which was certified to this court for its opinion agreeably to the act of Congress in such case made and provided, and was argued by counsel. And it appearing to this court, upon an inspection of the said transcript, that no point in the case within the meaning of the act of Congress has been certified to this court, it is thereupon now here ordered and decreed by this court that this cause be and is hereby dis-

missed, and that this cause be and is hereby remanded to the said circuit court to be proceeded with in accordance with law.

Form No. 249.

Judgment of Supreme Court on a certificate of division of opinion.

[Title of cause.]

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Rhode Island, and on the points and questions on which the judges of the said circuit court were opposed in opinions, and which were certified to this court for its opinion agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court that the grantees in the deed confirmed by the legislature of Rhode Island took an absolute title to the premises in dispute in this cause; which opinion answers the first, second, third, fourth and sixth questions so certified; and also the fifth question, except that part of said fifth question which refers to a description of the premises, and which is not so stated as to enable this court to express an opinion; all of which is hereby ordered and adjudged by this court to be certified in the said circuit court.

Form No. 250.

Decree and order on default.

[Title of cause as in No. 220.]

The subpœna in this cause having been returned executed sixty days before the return day thereof, and the defendant having failed to appear, it is, on motion of the complainant, decreed and ordered that the complainant be at liberty to proceed ex parte; and it is further decreed and ordered that unless the defendant, being served with a copy of this decree sixty days before the ensuing October term of this court, shall appear on the day of said term and answer the said bill of the complainant, this court will proceed to hear the cause on the part of the complainant and to decree on the matter of said bill.

Form No. 251.

Mandate.

United States of America, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of [or in case the mandate issues to a state court say to the honorable the judges of the supreme court or court of appeals of the state of], *Greeting:*

Whereas lately, in the circuit court of the United States for the district of , before you or some of you, in a cause between A. B., plaintiff, and C. D., defendant [or, if the cause came before the Supreme Court on a writ of error to the highest court in the state, say, whereas lately in the supreme court or court of appeals of the state of , before you, etc.], judgment was rendered by the said circuit court [or, if by a state court, say judgment was rendered by said supreme court or court of appeals of the state of], in the following words and figures, to wit: [here insert the judgment] as by the inspection of the transcript of the record of the said circuit court [or of said supreme court or court of appeals], which was brought into the Supreme Court of the United States by virtue of a writ of error [or an appeal taken], agreeably to the act of Congress in such case made and provided, fully and at large appears; and whereas in the present October term, in the year of our Lord one thousand eight hundred and eighty- , the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel: on consideration whereof, it is now here ordered, adjudged and decreed by this court that the judgment of said circuit court [or supreme court or court of appeals] in this cause be and the same is hereby reversed [or affirmed], with costs. [Here add any order or direction given to the court below; such as a direction to set aside a verdict, to grant a new trial, or awarding costs.]

You are, therefore, commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the honorable , Chief Justice of the said Supreme

Court, the first Monday in October, in the year of our Lord one thousand eight hundred and eighty- .

E. F., Clerk of the Supreme Court
of the United States.

Form No. 252.

Decree annulling former decree and revoking a mandate.[1]

[Title of cause.]

On consideration of the motion made by Mr. Sargeant, on a prior day of the present term of this court, to wit, on Monday, the 11th ultimo, and of the arguments of counsel thereupon had, as well against as in support of said motion, it is now here ordered, adjudged and decreed that the judgment and decree of this court, rendered in the above-entitled cause on Wednesday, the 26th day of February, A. D. 1840, be and the same is hereby declared utterly null and void; and that the mandate of this court directed to the judges of said circuit court in this cause be and the same is hereby revoked. And it is also now here further ordered that the clerk of this court do forthwith send to the judges of the circuit court of the United States for the southern district of Alabama a copy of this order of the court, under the seal of this court, together with a copy of the opinion of this court pronounced this day.

Form No. 253.

Form of order and decree where the court has no jurisdiction.[2]

[Title of cause.]

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Massachusetts, and was argued by counsel. On consideration whereof, it is the opinion of this court that neither said circuit court, nor said district court from which this case was removed to the said circuit court, had jurisdiction of this cause, and that consequently this court has not jurisdiction, but for the purpose of reversing the decree of said circuit court. Whereupon it is now here ordered and decreed by this court that the decree of the said circuit court, entertaining jurisdiction of the cause, be and the same is hereby

[1] *Ex parte* Crenshaw, 15 Pet. 124. [2] Cutter *v.* Rae, 7 How. 737 (1849).

reversed for the want of jurisdiction in that court; and that this appeal be and the same is hereby dismissed for the want of jurisdiction; and that this cause be and the same is hereby remanded to the said circuit court, with directions to proceed therein in conformity to the opinion of this court.

Form No. 254.

Form of suggestion for prohibition.

In the Supreme Court of the United States of America. } *ss:*

S. B. D., of the city of Philadelphia, in the state of Pennsylvania, being duly sworn deposes and says:

1st. That he is a lieutenant in the navy of the French republic and commander of the Cassius, a vessel of war of the republic, in her service and duly commissioned to cruise against her enemies, and make prizes of their ships and goods, as provided by his commission.

2d. That on the day of , 1795, one James Yard, a citizen of Pennsylvania, filed a libel in the district court of the United States within and for the district of Pennsylvania, before the honorable Richard Peters, judge of said court, as the owner of the schooner William Lindsay and her cargo, stating that while the schooner was on a voyage from the island of St. Thomas to St. Domingo, with all the regular documents of property and national character, she was violently and tortiously, and contrary to the law of nations, attacked and taken by a certain armed vessel called the Cassius, commanded by the deponent, pretending an authority from the French republic, but then and now a citizen of the United States of America, and carried into the Port de Paix, where the vessel was detained; that the vessel was originally fitted out and equipped for war in the state of Pennsylvania, contrary to the laws of the United States and the laws and usages of nations; that no compensation had been received by the libellant for the injuries sustained by him, and that the Cassius and the deponent were then in the port of Philadelphia, and asking that he might be compensated for the illegal taking and detention of the said schooner Lindsay and her cargo, and asking for process to be issued for seiz-

ing said vessel Cassius, and her tackle, apparel and furniture, and for arresting the body of your deponent, etc.

3d. That thereupon process was issued by order of said court, and your orator was arrested, and the said Cassius, etc., attached.

4th. This deponent further suggests that by the laws of nations and by treaties subsisting between the United States and the French republic, trials and captures on the high seas of vessels brought within the dominion and jurisdiction of the republic, and all questions incidental thereto, belong exclusively to the judiciary of the republic and to no other tribunals.

That by the laws of nations and the treaties between the United States and the French republic, the vessels of war of the republic and the officers commanding them cannot be sued or arrested in the ports of the United States, for captures made on the high seas, and brought for legal adjudication into the ports of the republic; and the district court of the United States ought not to maintain jurisdiction or hold pleas of such captures.

That by the laws of nations the vessels of war of belligerent powers, duly authorized, may take as prizes of war the ships and goods of their enemies; and may, in time of war, arrest and seize the vessels belonging to the subjects and citizens of neutral nations, and bring them into the ports of the sovereign under whom they act, there to answer for any breaches of the laws of nations concerning the navigation of neutrals in time of war; and the commanders of such vessels are not amenable before the tribunals of neutral powers for their conduct therein, but only to their own sovereign under whom they act.

Wherefore the said S. B. D., the aid of this honorable court most respectfully requesting, prays remedy, by a writ of prohibition to be issued out of this honorable court to the said judge of the district court of the United States in and for the district of Pennsylvania, to be directed to prohibit him from holding the plea aforesaid, the premises aforesaid anywise concerning, further before him.

[Jurat.] S. B. D.[1]

[1] It may be proper here to observe that the clerks of the various United States courts, commissioners and notaries public, may administer oaths and take affidavits for the courts of the United States. See act approved August 15, 1876, 19 U. S. Stat. 206.

Form No. 255.

Form of writ of prohibition.

United States of America:

The President of the United States to the honorable Richard Peters, esquire, judge of the district court of the United States in and for the Pennsylvania district:

It is shown to the judges of the Supreme Court of the United States, by Samuel B. Davis, that whereas, by the laws of nations and the treaties subsisting between the United States and the republic of France, the trial of prizes taken on the high seas, without the territorial limits and jurisdiction of the United States, and brought within the dominion and jurisdiction of the said republic for legal adjudication, by vessels of war belonging to the sovereignty of the said republic, acting under the same, and of all questions incidental thereto, does of right and exclusively belong to the tribunals and judiciary establishments of said republic, and to no other tribunal or tribunals, court or courts, whatsoever:

Wherefore the said Samuel B. Davis, the aid of the said Supreme Court most respectfully requesting, hath prayed remedy by a writ of prohibition, to be issued out of the said Supreme Court, to you to be directed, to prohibit you from holding the plea aforesaid, the premises aforesaid anywise concerning, further before you:

You therefore are hereby prohibited, that you no further hold the plea aforesaid, the premises aforesaid anywise touching, before you, nor anything in the said district court attempt, nor procure to be done, which may be in anywise to the prejudice of the said Samuel B. Davis, or to the said corvette or vessel of war called the Cassius, or in contempt of the laws of the United States; and also, that from all proceedings therein you do, without delay, release the said Samuel B. Davis, and the vessel of war called the Cassius, at your peril.

Witness the honorable , Chief Justice of said Supreme Court, with the seal of the said court attached, at the city of Washington, this day of , 18 .

[SEAL] , Clerk of the Supreme Court of the United States.

FORM No. 256.

Supersedeas from the Supreme Court.

UNITED STATES OF AMERICA, *set:*

The President of the United States of America to the honorable , one of the judges of the circuit court of the United States for the southern district of Mississippi, and to the marshal of the United States for the said district, *Greeting:*

Whereas lately, in the said circuit court, before you, the said judges, or some of you, in a cause lately pending in said court, between Edward Anderson, plaintiff, and William Hardeman and D. Hardeman, defendants, a judgment was rendered by the said circuit court, at the May term, 1839, of said court, in favor of the said plaintiff, and against the said defendants, for the sum of $8293 45, with interest thereon at the rate of eight per centum per annum, together with costs and charges of suit, on which judgment an execution of fieri facias issued, and was levied by the marshal of said district on certain property of said defendants, which property was left in the hands of the defendants upon their executing a forthcoming bond, with one W. P. Perkins as security, and which forthcoming bond was returned by the said marshal to the said circuit court at the next November term thereof, A. D. 1839, "forfeited," having thereby, according to the laws of Mississippi, the force and effect of a judgment against the said defendants and the said security for the aforesaid debt, interest and costs, and upon which last-mentioned judgment an execution of fieri facias was issued against the goods and chattels, lands and tenements of the said William Hardeman, D. Hardeman and W. P. Perkins for the amount of the said judgment, interest and costs as aforesaid, as also for the sum of $133 81 additional costs subsequently accruing; upon which execution the aforesaid marshal returned that he had received thereon "$9125 in Union money, or post-notes of the Union Bank," which said return of the marshal last aforesaid the said circuit court at a subsequent term, to wit, on the 20th of May, A. D. 1840, set aside and awarded an alias fieri facias on the judgment last aforesaid. Whereupon the said William Hardeman, D. Hardeman and W. P. Perkins sued out a writ of error in due form of law and in proper time, and filed their bond in error, with sufficient security approved by one of the judges of the said circuit

court, so as to operate per se as a supersedeas, and which said writ of error was abated and quashed by the order of this court on the 28th day of February, A. D. 1845, by virtue of the forty-third rule of court, in consequence of the failure of the aforesaid plaintiffs in error to file a transcript of the record of the case with the clerk of this court and to have their case docketed, in compliance with the rules of court. Whereupon the aforesaid plaintiffs in error sued out another writ of error in due form of law, filed their bond in error in a sum double the amount of the aforesaid judgment, with sufficient security approved by one of the judges of the aforesaid circuit court, and a citation having been regularly taken out, served upon the defendant in error and duly returned, as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of said writ of error, agreeably to the statutes of the United States in such case made and provided, fully and at large appears. And whereas in the present term of December, in the year of our Lord eighteen hundred and forty-five, it is made to appear on affidavit, to the said Supreme Court of the United States, that the failure of the aforesaid plaintiffs in error to file the transcript of the record and docket the writ of error first aforesaid mentioned, and which operated per se as a supersedeas, was not owing to any neglect or fault on their part, but wholly attributable to the neglect of the clerk of the said circuit court to make out in due time, and as requested by the said plaintiffs in error, a transcript of the record as alleged in said affidavit, and that in consequence thereof they are exposed to an execution of the aforesaid judgment. It is thereupon now here ordered by this court that a writ of supersedeas be and the same is hereby awarded, to be directed to the aforesaid marshal, commanding and enjoining him and his deputies to stay all and any proceedings upon any execution which may have been issued on the aforesaid judgment of the said circuit court in said case, and which has or may come to his hands, and that he return any such execution with the writ of supersedeas to the said circuit court, and that the judges of the said circuit court cause any such writ of execution to be stayed, and to stay any execution or further proceedings of every kind and character on the judgment of the said circuit court in this case, pending the aforesaid writ of error in this court.

You, therefore, the marshal of the United States for the southern

district of Mississippi, are hereby commanded that from every and all proceedings on any execution on the aforesaid judgment, or in anywise molesting the said defendants on the account aforesaid, you entirely surcease, as being superseded, and that you do forthwith return any such execution in your hands, together with this supersedeas, to the said circuit court, as you will answer the contrary at your peril. And you, the judges of the said circuit court, are hereby commanded to stay any execution which may have issued as aforesaid, and to stay any execution or further proceedings on the aforesaid judgment of the said circuit court in this case, pending the writ of error last aforesaid in this court.

Witness the honorable Roger B. Taney, Chief Justice of said Supreme Court, this 27th day of January, in the year of our Lord one thousand eight hundred and forty-six.

Wm. Thos. Carroll, Clerk of the Supreme
Court of the United States.

Form No. 257.

Writ of mandamus.

United States of America:

To the honorable , judge of the district court of the United States for the northern district of New York, *Greeting:*

Whereas one Martha Bradstreet hath heretofore commenced and prosecuted in your court several certain real actions or writs of right in your court lately pending between said Martha Bradstreet, demandant, and the following-named tenants, severally and respectively, to wit, Apollos Cooper and others (naming them). And whereas heretofore, to wit, at a session of the Supreme Court of the United States, held at Washington, on the day of , it appeared, upon the complaint of said Martha Bradstreet, among other things, that at a session of your said court, lately before holden by you according to law, all and singular the said writs of right then pending before your said court, upon the motion of the tenants aforesaid were dismissed, for the reason that there was no averment of the pecuniary value of the lands demanded by the said demandant, in the several counts filed and exhibited by the said demandant against the several tenants as afore-

said, which orders of your said court so dismissing the said actions were against the will and consent of said demandant; whereupon the said Supreme Court, at the instance of said demandant, granted a rule requiring you to show cause, if any you had, among other things why a writ of mandamus from the said Supreme Court should not be awarded and issued to you, commanding you to reinstate, and proceed to try and adjudge according to the law and the right of the case, the several writs of right aforesaid, and the issues therein joined. And whereas at the late session of the Supreme Court, held at Washington on the second Monday of January, in the year 1833, you certified and returned to the said Supreme Court, together with said rule, that, after the issues had been joined in the several causes mentioned in said rule, motions were made therein, on the part of the tenants, that the same should be dismissed, upon the ground that the counts respectively contained no allegation of the value of the matter in dispute, and that it did not therefore appear by the pleadings that the causes were within your jurisdiction; that in conformity with what appeared to have been the uniform language of the national courts upon the question, and your own views of the law, and in accordance especially with several decisions in the circuit court for the third circuit (4 Wash. C. C. Rep. 482, 624), you granted their motion; and assuming that the causes were rightfully dismissed, it follows of course that you ought not to be required to reinstate them, unless right also be granted to the demandant to amend her counts; and whereas afterwards, to wit, at the same session of the Supreme Court last aforesaid, upon consideration of your said return, and of the cause shown by you therein against the said rule being made absolute, and against the awarding and issuing of the said writ of mandamus, and upon consideration of the argument of said counsel, as well on your behalf, showing cause as aforesaid, as on behalf of said demandant in support of said rule, it was considered by the said Supreme Court that you had certified and returned to the said Supreme Court an insufficient cause for having dismissed the said actions, and against the awarding and issuing of the said writ of mandamus, pursuant to the rule aforesaid; the said Supreme Court being of opinion, and having determined on the matter aforesaid, that in cases where the demand is not made for money, and the nature of the action does not require the value of the things demanded to be stated in the

declaration, the practice of the said Supreme Court, and of the courts of the United States; is to allow the value to be given in evidence in the said Supreme Court, consequently she cannot be legally prevented from bringing her case before the said Supreme Court; and it was also then and there considered by the said Supreme Court that the peremptory writ of mandamus issue requiring you, the said judge of the said district court, to reinstate and proceed to try and adjudge according to the law and right of the case the several writs of right and the issues therein joined, lately pending in your said court between the said Martha Bradstreet, demandant, and Apollos Cooper and others, the tenants aforesaid; therefore, you are hereby commanded and enjoined that immediately after the receipt of this writ, and without delay, you reinstate and proceed to try and adjudge according to the law and right of the case the several writs of right and the issues joined therein, lately pending in your said court between the said Martha Bradstreet, demandant, and the said Apollos Cooper and others, the tenants herein above named, so that complaint be not again made to the said Supreme Court; and that you certify perfect obedience and due execution of this writ to the said Supreme Court, to be held on the first Monday in August next. Hereof fail not at your peril, and have then and there this writ.

Witness the honorable John Marshall, Chief Justice of the said Supreme Court, the second Monday of January, in the year of our Lord one thousand eight hundred and thirty-three.

W. T. Carroll, Clerk Supreme Court of the United States.[1]

Form No. 258.

Injunction from the Supreme Court.

The United States of America }
in the Supreme Court. }

The President of the United States of America to Erastus Corning, John F. Winslow and James Horner.

Whereas in a certain suit in the Supreme Court of the United States, removed there by the appeal of the complainant from the

[1] The above writ was prepared under the order of the court, and is reported in *Ex parte* Bradstreet, 7 Pet. 634.

circuit court of the United States for the northern district of New York, in which latter court the Troy Iron and Nail Factory was complainant and you were defendants in chancery, the said Supreme Court by a decree made upon a hearing of the said cause this eighteenth day of January, in the year of our Lord eighteen hundred and fifty-three, ordered, adjudged and decreed among other things that an injunction should issue under the seal of the said court to restrain you, the said Erastus Corning, John F. Winslow and James Horner, and each of you, perpetually from using the improved machinery with the bending lever for making hook or brad-headed spikes, patented to Henry Burdue on the second day of September, A. D. 1840, and assigned to the complainant. It is therefore, in execution of said decree, hereby firmly enjoined and commanded you and every of you, that from and immediately after being served with this writ or notice thereof you and every of you do not use the aforesaid machinery; but that you and every of you do from henceforth entirely cease and desist from using the aforesaid machinery with the bending lever for making hook and brad-headed spikes, patented to Henry Burdue the second day of September, A. D. 1840, and assigned to the complainant; and this you shall in no wise omit at your peril.

Witness the honorable Roger B. Taney, Chief Justice of the said Supreme Court, this eighteenth day of January, in the year of our Lord one thousand eight hundred and fifty-three.

, Clerk of the Supreme Court of the United States.

Form No. 259.

Certificate of division.

United States of America, }
North Carolina district. }

At a circuit court of the United States, begun and held at Raleigh, for the district of North Carolina, on Wednesday the twenty-ninth December, in the year of our Lord one thousand eight hundred and ten, and in the twenty-seventh year of American independence.

Present:—The honorable John Marshall and Henry Potter, esquires.

Robert Ogden, administrator *de bonus non*, with the will annexed, of Samuel Cornell,
v.
Richard Salter, deceased.

This is an action of debt upon a bond given by the defendant's testator to the testator of the plaintiff on the second of March, 1775.

The defendant among other pleas pleads in bar an act of the general assembly of the state of North Carolina, passed in the year 1715, entitled "An act," etc., the ninth section of which is in the following words:

"That the creditors of any person deceased shall make their claims within seven years after the death of said debtor, otherwise such creditors shall be forever barred."

To which plea the plaintiff replies in substance that the plaintiff's testator was, at his death, a British subject, and the debt within the term, intent and meaning of the treaty of peace concluded between the king of Great Britain and the United States.

To this replication the defendant demurs, and the plaintiff joins in the demurrer.

The case came on to be argued at this term; it occurred, as a question, whether the act of assembly recited in the plea of the defendant was, under all the circumstances stated, and the various acts passed by the legislature of North Carolina, a bar to this action.

On which question the opinions of the judges were opposed.

Whereupon, on motion of the plaintiff by his counsel that the point on which the disagreement hath happened may, during the term, be stated under the direction of the judges and certified under the seal of the court to the Supreme Court, to be finally decided:

It is ordered that the foregoing state of the pleadings and the following statement of facts, which is made under the direction of the judges, be certified according to the request of the plaintiff by his counsel, and the law in that case made and provided, to wit:

First. That Samuel Cornell, the plaintiff's testator, was, and until his death continued to be, a subject of the king of Great Britain; and the defendant's testator was, and continued to be until his death, a citizen of North Carolina.

Second. That the defendant's testator died in the year 1780, and the defendant in the same year was qualified as executor.

Third. That the plaintiff sued out his writ in this suit on the fifth day of October, 1798.

UNITED STATES OF AMERICA,
NORTH CAROLINA DISTRICT. } *ss:*

I, William H. Haywood, clerk of the circuit court for the district of North Carolina, do hereby certify the foregoing to be a copy from the minutes. .

Given under my hand and seal of office at Raleigh, on the fifth day of January, in the year of our Lord one thousand eight hundred and two.[1]

W. H. Haywood, Clerk.

FORM NO. 260.

Certiorari.

The United States of America.

The President of the United States of America to the judge of , *Greeting:*

Whereas in a certain suit in court, in which is plaintiff and is defendant, which suit was removed by writ of error to the Supreme Court of the United States, agreeably to the act of Congress in such case made and provided, certain inaccuracies, defects and omissions in the record of the proceedings have been suggested, to wit:

You therefore are commanded that, searching the record and proceedings in said cause, you certify forthwith to the said Supreme Court, under your seal, a full, true and complete transcript of said record and proceedings, plainly and distinctly, and in as full and ample a manner as the same now remains before you, together with this writ; so that the said Supreme Court of the United States may be able thereon to proceed and do what shall appear to them of right ought to be done. Herein fail not.

Witness the honorable , Chief Justice of the said Supreme Court, this day of .

, Clerk of Supreme Court.

[1] The above form was inserted by Mr. Cranch as a precedent, in Ogden *v.* Blackledge, 2 Cr. 272.

Form No. 262.

Petition for a habeas corpus.

To the Supreme [or district or circuit court of the United States, describing it] Court of the United States.

The petitioner, L. P. M., of , complaining, shows that he is unjustly and unlawfully detained and imprisoned by A. B. [marshal or sheriff or other person] in the jail [or prison or other place] at Indianapolis, in the state of Indiana, by virtue of a warrant [or order or other process] of commitment issued under the following circumstances:

Your petitioner is a citizen of the United States, and has been a citizen of the state of Indiana for over twenty years, and at the time of the grievances herein complained of had never been in the military or naval service of the United States; that on the fifth day of October, 1864, while at home in said state, he was arrested by order of General Alvin P. Hovey, then commanding the military district of Indiana, and has ever since been kept in close confinement; that on the twenty-first day of October, 1864, he was brought before a military commission convened at Indianapolis, by order of said General Hovey, upon the following charges:

1. Conspiracy against the government of the United States.
2. Affording aid and comfort to rebels against the authority of the United States.
3. Inciting insurrection.
4. Disloyal practices; and
5. Violation of the laws of war.

Your petitioner objected to the authority of the commission to try him on said charges, but his objections were overruled and said commission proceeded to try him, and found him guilty of all the charges, and sentenced him to suffer death by hanging, and he was ordered to be hung on Friday, the nineteenth day of May, 1865, which sentence was approved by the President of the United States.

Your petitioner further shows that while he was being detained and imprisoned as aforesaid, and more than twenty days after his said arrest, the circuit court of the United States for the district of Indiana was convened at Indianapolis, where he was and is kept in confinement, and a grand jury was then and there convened and in attendance on said court, and duly empannelled, charged and sworn

and held its sittings, and finally adjourned without having found any bill of indictment against him, etc., and your petitioner is held, detained and imprisoned by virtue of said proceedings, and on an order of said commission, to await the execution of said sentence.

And your petitioner claims that said military commission had no jurisdiction or authority, legally, to try and sentence him in the manner and form above stated.

Wherefore, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of habeas corpus, to be directed to the said A. B., may issue in this behalf, so that your petitioner may be forthwith brought before this court to do, submit to and receive what the law may require.

L. P. M.

UNITED STATES OF AMERICA, }
DISTRICT OF . } *ss:*

L. P. M., being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and that the statements therein made are true as he verily believes.

L. P. M.

Subscribed and sworn to this day of , 18 .

C. D., United States commissioner.

FORM NO. 263.

Writ of habeas corpus.

The President of the United States of America to A. B., marshal of, etc. [or sheriff or other person, as the case may be].

We command you that the body of L. P. M., by you detained and imprisoned, as is charged, you have forthwith before our circuit [or district or supreme] court of, etc. [or before the honorable E. F., judge of the court, etc.], at , together with the cause of the detention of the said L. P. M., to undergo and receive what our said court [or judge, etc.] shall consider concerning him in this behalf: and have you then and there this writ.

Witness the honorable , Chief Justice of the Supreme Court of the United States, this day of , 18 .

E. M., Clerk of the Supreme

[L. S.] [or circuit] Court of the United States.

Form No. 264.

Form of return to a writ of habeas corpus.

To the Supreme [or circuit or district court, or judge or justice, as the case may be] Court of the United States [or to the honorable G. H., circuit [or district] judge of the circuit [or of the district of].

A. B., to whom the within [or annexed] writ is directed, has now here before the court [or your honor] the body of L. P. M. therein named, as thereby commanded. And I certify that the cause of the detention of the said L. P. M. is a warrant of commitment [or order or other process] directed to me, , a copy of which is hereto annexed marked "Exhibit A," and made a part hereof, issued in the manner and under the circumstances and for the purpose set forth in the petition of the said L. P. M., herein.

A. B.

Dated this day of , 18 .

Form No. 265.

Writ of habeas corpus ad testificandum.

The President of the United States of America to the marshal of [or as the case may be], *Greeting:*

You are hereby commanded that you have the body of , now in prison [or as the case may be] under your custody, as it is said, under safe and secure conduct, before, etc. [as in the subpœna], to testify the truth, according to his knowledge, in a certain case now depending, etc. [as in the subpœna], and immediately after the said shall then and there have given his testimony, that you return him to the said prison [or as the case may be] under safe and secure conduct, and have there then this writ.

Witness, etc. [as in the capias].

FORMS FOR COURT OF CLAIMS.

FORM No. 266.

Petition; general frame.

In the Court of Claims, October , 18 .

A. B.
v.
The United States. } No.

To the honorable justices of said court:

Your petitioner, A. B., respectfully shows that he is a citizen of the United States [or an alien and citizen of some foreign country (naming it) which accords to citizens of the United States the right to prosecute in its courts claims against such governments]. That [here set forth the cause of action according to the usual practice in other courts; and conclude as follows]:

Your petitioner therefore demands judgment against the United States for the sum of $.

A. B., by G. F., his attorney.

District of [or state of , County of], *ss:*

Personally appeared before me, A. B., the claimant named in the foregoing petition, and made oath that the matters and things set forth and stated in his said petition are true of his own knowledge [or to the best of his knowledge and belief; or, that the matters and things stated in his said petition are true so far as they are stated on his own knowledge, and so far as they are stated on the information of others, he believes them to be true].

A. B., Complainant.

Subscribed and sworn to this day of , 18 .

[L. S.] E. J., Commissioner.

[Or, K. L., clerk of the court of said county; or M. N., notary public.]

FORM NO. 267.

Petition in a case transmitted by the head of any department under section 1064.

A. B.
v.
The United States.

Your petitioner, A. B., respectfully shows [here set forth the claim in the usual manner, the presentation of the claim to the department, the action had by the department, etc., and the transmission therefrom, as provided by sections 1063 and 1064 of the Revised Statutes, and conclude as follows]:

Wherefore he claims judgment against the United States for the sum of $.

A. B., by G. F., claimant's attorney.

[Add usual verification.]

FORM NO. 268.

Another and fuller form of a petition.

In the Court of Claims, 18 .

A. B.
v.
The United States.

To the honorable the Court of Claims:

The claimant, , respectfully shows to this honorable court that heretofore, to wit, on the day of , in the year 18 , he entered into a certain express contract in writing with the United States for the transportation of the mail between and , both in the state of , from the day of , 18 , to the day of , 18 , at and for a compensation of a year; a certified copy of which contract is annexed to this petition and made a part of the evidence in this case; that the claimant carried the mail under his said contract and in accordance therewith, from the said day of July, 18 , down to and including the day of , 18, when the contract was annulled and taken away from him by the United States; that he has received no payment for the last of the period aforesaid, to wit, from the day of , 18 , to and including the day of , 18 , and compensation is due him at the rate aforesaid for the said , amount-

ing to the sum of ; that Congress, on the 3d day of March, 1877, by an act entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1878, and for other purposes," made an appropriation of three hundred and seventy-five thousand dollars, which was by the said act directed to be applied to the payment of this and other like claims; that by said act a claim accrued to the claimant to be paid the amount of ; that the Secretary of the Treasury and the Sixth Auditor thereof refused and neglected to distribute any portion of the said appropriation, but covered the whole of the same into the treasury of the United States; that this claim has not been paid in whole or in part by the Confederate States government, or by any government or pretended government of any state, or by the defendants, or by any government, corporation or person whatsoever; that no action has been had on this claim in Congress or by any of the departments; that the claimant is the sole owner of this claim and the only person interested therein; that no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; that the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and off-sets; that the claimant is a citizen of the United States [and has at all times borne true allegiance to the government thereof, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said government];[1] and that the claimant believes the facts as stated in this petition to be true. And the claimant demands judgment for .

, Attorneys for claimant.

STATE OF , }
County. } *ss:*

, being duly sworn, deposes and says, I am the claimant in this case. I have heard the above petition read, and the facts therein stated are true to the best of my knowledge and belief, so help me God.

A. B.

Subscribed and sworn to before me this day of , 18 .

[SEAL.] J. W. West, Clerk of court.

[1] The clause in brackets does not appear to be essential, by the decision of the Supreme Court under the Captured and Abandoned Property Act. See *ante*, § 429.

EXHIBIT TO CLAIMANT'S PETITION.

UNITED STATES OF AMERICA.

POST-OFFICE DEPARTMENT,
Washington, D. C., , 18 .

I, Richard A. Elmer, acting Postmaster General of the United States of America, certify that the annexed is a true copy of the original contract now on the files of this department.

In testimony whereof I have hereto set my hand and caused the seal of the Post-Office Department to be affixed, at the city of Washington, the day and year above written.

[L. S.] . Richard A. Elmer, Acting Postmaster General.

No. . $ per annum.

This article of contract, made the day of , in the year one thousand eight hundred and , between the United States (acting in this behalf by their Postmaster General) and ,

Witnesseth that whereas has been accepted according to law as contractor for transporting the mail on route No. from , at dollars per year for and during the term commencing the day of , in the year one thousand eight hundred and , and ending with the thirtieth of June, in the year one thousand eight hundred and sixty- . Now, therefore, the said , contractor, and , his sureties, do jointly and severally undertake, covenant and agree with the United States, and do bind themselves:

1st. To carry said mail within the times fixed in the annexed schedule of departures and arrivals, except that when more than seven minutes are taken for opening and closing the mails at any office, the surplus time so taken is to be allowed in addition to what is given in the schedule; and so carry until said schedule is altered by the authority of the Postmaster General of the United States, as hereinafter provided, and then to carry according to said altered schedule. 2d. To carry said mail in a safe and secure manner, free from wet or other injury, under a sufficient oilcloth or bear skin. 3d. To take the mail and every part of it from, and deliver it and every part of it at, each post-office on the route, or that may hereafter be established on the route, and into the post-office at each

end of the route, and into the post-office at the place at which the carrier stops at night, if one is there kept; and if no office is there kept, to lock it up in some secure place at the risk of the contractor.

They also undertake, covenant and agree with the United States, and do bind themselves jointly and severally as aforesaid, to be answerable for the person to whom the said contractor shall commit the care and transportation of the mail, and accountable to the United States for any damages which may be sustained by the United States through his unfaithfulness or want of care; and that the said contractor will discharge any carrier of said mail whenever required to do so by the Postmaster General; also, that he will not transmit by himself or his agent, or be concerned in transmitting, commercial intelligence more rapidly than by mail; and that he will not carry out of the mail letters or newspapers which should go by post.

They further undertake, covenant and agree with the United States that the said contractor will collect quarterly, if required by the Postmaster General, of postmasters on said route, the balances due from them to the General Post-Office, and faithfully render an account thereof to the Postmaster General in the settlement of quarterly accounts, and will pay over to the General Post-Office all balances remaining in his hands.

For which services, when performed, the said , contractor, is to be paid by the United States the sum of dollars a year, to wit: quarterly in the months of May, August, November and February, through the postmasters on the route, or otherwise, at the option of the Postmaster General of the United States; said pay to be subject, however, to be reduced or discontinued by the Postmaster General, as hereinafter stipulated, or to be suspended in case of delinquency.

It is hereby stipulated and agreed, by the said contractor and his sureties, that the Postmaster General may alter the contract, and alter the schedule, he allowing a *pro rata* increase of compensation within the restrictions imposed by law for the additional service required, or for the increased speed, if the employment of additional stock or carriers is rendered necessary; but the contractor may, in case of increased expedition, relinquish the contract on timely notice if he prefer it to the change; also, that the Postmaster Gen-

eral may discontinue or curtail the service in whole or in part, in order to place on the route a greater degree of service, or whenever the public interests require such discontinuance or curtailment for any other cause, he allowing one month's extra pay on the amount of service dispensed with.

It is hereby also stipulated and agreed, by the said contractor and his sureties, that in all cases there is to be a forfeiture of the pay of a trip when the trip is not run; and of not more than three times the pay of the trip when the trip is not run and no sufficient excuse for the failure is furnished; a forfeiture of at least one-fourth part of it when the running is so far behind time as to lose connection with a depending mail; and that these forfeitures may be increased into penalties of higher amount according to the nature or frequency of the failure and the importance of the mail; also that fines may be imposed upon the contractor unless the delinquency be satisfactorily explained to the Postmaster General in due time, for failing to take from or deliver at a post-office the mail or any part of it; for suffering it to be wet, injured, lost or destroyed; for carrying it in a place or manner that exposes it to depredation, loss or injury, by being wet or otherwise; for entrusting the mail to a carrier under sixteen years of age; or for not arriving at the time set in the schedule. And for setting up or running an express to transmit letters or commercial intelligence in advance of the mail, a penalty may be exacted of the contractor equal to a quarter's pay; but in all other cases no fine shall exceed three times the price of the trip.

And it is hereby further stipulated and agreed, by the said contractor and his sureties, that the Postmaster General may annul the contract for repeated failures; for violating the post-office laws; for disobeying the instructions of the department; for refusing to discharge a carrier when required by the department; for assigning the contract without the consent of the Postmaster General; for setting up or running an express as aforesaid; or whenever the contractor shall become a postmaster, assistant postmaster or member of Congress; and this contract shall, in all its parts, be subject to the terms and requisitions of an act of Congress passed on the twenty-first day of April, in the year of our Lord one thousand eight hundred and eight, entitled "An act concerning public contracts."

In witness whereof the said Postmaster General has caused the seal of the Post-Office Department to be hereto affixed, and has attested the same by his signature, and the said contractor and his sureties have hereunto set their hands and seals the day and year set opposite to their names, respectively.

Horatio King, Acting Postmaster General.

Signed, sealed and delivered by the Postmaster General in the presence of

R. T. Spotswood.

And by the other parties hereto in the presence of .

I hereby certify that I am well acquainted with and and the condition of their property, and that after full investigation and inquiry I am well satisfied that they are good and sufficient sureties for the amount in the foregoing contract.

, Postmaster at .

THE SCHEDULE OF DEPARTURES AND ARRIVALS.

Leave .
Arrive at .
Leave .
Arrive at .

FORM No. 269.

Notice by the clerk.

A. B.
v.
The District of Columbia. } No.

CLERK'S OFFICE,
Washington, D. C., , 18 .

To , attorney for claimant.

Sir:—Take notice that in the above cause there has been filed this day on behalf of the defendant, , in this office, a plea of the Statute of Limitation to the petition of the claimant.

Respectfully, , Clerk Court of Claims.

FORM NO. 270.

Notice by the clerk of papers filed.

A. B.
v.
The United States. } No.

CLERK'S OFFICE,
Washington, D. C., , 18 .

To , Attorney General of U. S.

Sir:—Take notice that in the above cause there has been filed this day on behalf of the claimant, , in this office, a petition claiming of the United States $, on a contract.

Respectfully, , Clerk Court of Claims.

FORM NO. 271.

Plea of limitation.

A. B.
v.
The United States. } No.

Now come the defendants, by their Attorney General, and say that the claimant herein should not further have or maintain suit against the defendants, for the reason that the petition of the claimant was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, etc.

, Assistant Attorney General.

FORM NO. 272.

Traverse.

A. B.
v.
The United States. } No.

And now comes the Attorney General on behalf of the United States, and makes answer to the petition of the claimant herein; and not confessing the same or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of $, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant at all times borne true faith and allegiance to the government of the United States, and never voluntarily aided, abetted or given encouragement to rebellion against the said government, denies the said allegation.

, Assistant Attorney General.

FORM NO. 273.

Subpœna for witnesses.

To .

You are hereby commanded to appear before , commissioner, appointed by this court to take depositions, on the day of , A. D. 18 , at o'clock in the noon, at his office in the of , in the county of and state of , then and there to testify in the case of against the United States, now pending in this court.

Fail not of appearance at your peril.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this day of , A. D. 18 .

, Clerk of the Court of Claims.

FORM NO. 274.

Instructions for taking depositions to be used in the Court of Claims.

Let the officer begin with the following caption:

Depositions of a witness [or witnesses] produced, sworn and examined at the hour of o'clock M., on the day of , 18 , at , before me, the undersigned, a , in a certain cause now pending in the Court of Claims, wherein claimant and the United States are defendants; when were present , counsel on behalf of the claimant, and , counsel on behalf of the defendants.

, having been produced as a witness on behalf of the , was by me sworn [or affirmed], before any question was put to him, to tell the truth, the whole truth and nothing but the truth relative to the said cause; and thereupon deposed and said that his name is ; that his occupation is that of ; that he is years of age; that his place of residence is ; that he has no interest, direct or indirect, in the claim which is the subject of inquiry in said cause (or if interested, let him state the nature and extent of his interest); and that he is not related to the claimant (or, if he be related to the claimant, let him state his relationship).

And thereupon the said was examined by the counsel for the , and in answer to interrogatories testified as follows:

1. Question. (Record the question.)

Answer. (Record the answer as nearly as may be in the witness' own words.)

(Let each succeeding question of the direct examination be numbered; and at the close of that examination proceed as follows:)

The said witness was then cross-examined by the counsel for the , and in answer to interrogatories testified as follows:

1. Cross-interrogatory. (Record it.)

Answer. (Record it.)

(Let each succeeding question of the cross-examination be numbered.)

(On re-direct or re-cross examination record the questions and answers in like manner.)

If more than one witness is examined, let the following caption of each deposition be made:

At the same place, on the same day (or if an adjournment has taken place, write on the day of , 18), in the presence of the same counsel of both parties, , a witness on behalf of the , was produced, and having been by me in like manner sworn (or affirmed), deposed and said that his name is, etc. (as prescribed in the case of the first witness).

And thereupon the said was examined by the counsel for the , and in answer to interrogatories testified as follows: (See directions above.)

In case of adjournment before closing a deposition, record the proceeding as follows:

At this point the taking of this deposition was, by consent of the parties (or as the case may be), adjourned to at o'clock M., at the same place.

On resumption of the deposition, record the proceeding as follows:

Deposition of resumed according to adjournment at the time and place fixed, the same parties present as aforesaid [or as the case may be].

In case of adjournment at the close of a deposition before closing all the testimony, record the proceeding as follows:

Thereupon the proceeding herein was, by consent of the parties [or as the case may be], adjourned to at o'clock M., at the same place.

On resumption of the proceeding, record the same as follows:

The proceeding herein resumed according to adjournment at the time and place fixed, the same parties present as aforesaid [or as the case may be].

At the close of the examination by the respective counsel, record the final statement of the witness as follows:

The examination by counsel being concluded, the witness, in compliance with the rule of the court requiring him to state whether he knows of any other matter relative to the claim in question, and if he do state it, says:

(Signature of witness.)

FINAL CERTIFICATE WHEN ONLY ONE WITNESS IS EXAMINED.

At the close of the deposition, let the officer certify as follows:

I, , a commissioner of the Court of Claims, in and for the state [or territory or district] of [or whatever else may be his office], certify that at the time [or times where there have been adjournments] and place aforesaid, , a witness on behalf of the in the above-entitled cause, was by me sworn [or affirmed] before any question was put to , to tell the truth, the whole truth and nothing but the truth relative to the said cause; and that answers were taken down in my presence, and deposition as above set forth was read over to and signed by before me at the time and place aforesaid.

In witness whereof I have hereunto set my hand and official seal (if he have one) this day of , 18 .

FINAL CERTIFICATE WHERE TWO OR MORE WITNESSES ARE EXAMINED.

I, , a commissioner of the Court of Claims, in and for the state [or territory or district] of [or whatever else his office may be], certify that at the time [or times where there have been adjournments] and place aforesaid, , witnesses on behalf of the in the above-entitled cause, were each by me sworn [or affirmed] before any question was put to , to tell the truth, the whole truth and nothing but the truth relative to the said cause; and that the answers of each of said witnesses were taken down in my presence, and the deposition of each of them, as above set forth, was read over to and signed by before me at the time [or times] and place as aforesaid.

In witness whereof I have hereunto set my hand and official seal (if he have one) this day of , 18 .

EXTRACT FROM RULES OF THE COURT.

ARTICLE VI.—*Sec.* 2. Unless the court order a witness to testify orally on the trial, the evidence of witnesses must be by deposition, taken either before a commissioner of the court or a judge of a court of the United States, or a judge of a court of record in a state or territory of the United States, or a commissioner appointed by a circuit court of the United States, or a notary public.

ARTICLE VIII.—*Sec.* 3. Where a deposition is taken by oral examination, each question propounded to the witness must be recorded, and his answers must be taken down, as nearly as may be, in his own words.

Sec. 4. No general objection to any question shall be noticed by the officer; but where an objection is made on specifically stated grounds, the officer shall record the same in direct connection with the question objected to.

Sec. 5. When depositions are taken on notice, as provided in section 1 of this article, if both parties are present or represented at the time and place specified in the notice, either party may, after the examination of the witnesses produced under the notice, be entitled to produce and examine other witnesses; but in order thereto one day's notice must be given to the adverse party, or his attorney, there present.

ARTICLE IX.—*Sec.* 1. Witnesses must be sworn or affirmed, before any questions are put to them, to tell the truth, the whole truth and nothing but the truth, relative to the cause in which they are to testify; and each witness shall then state his name, his occupation, his age if under twenty-one years, his place of residence; whether he has any, and if any what, interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, he is related to the claimant. At the conclusion of the deposition the witness shall state whether he knows of any other matter relative to the claim in question; and if he do, he shall state it. The testimony of the witness when completed shall be read over to him, and be signed by him in the presence of the officer.

Sec. 2. The officer should so connect the sheets of the deposition that they cannot be tampered with, and should return them sealed together. He should sign, and make the witness sign, each sheet; and generally he should spare no pains to return to the court the exact evidence he has taken. All exhibits should be carefully marked so as to be capable of immediate identification, and, when practicable, should be attached to the deposition under seal.

Sec. 3. The officer must state, in the caption of the deposition, the cause in which it was taken, the place and date of taking, the name of the witness, the party by whom called, and the names of the parties and counsel present. And in the body of the deposition must also be shown by whom the witness was examined and cross-examined.

Sec. 4. In his return the officer must show that the witness was properly sworn or affirmed, and that the answers were taken down in his presence, and read over to and signed by the witness.

Sec. 5. The officer must inclose the commission, depositions and exhibits in a packet, under his seal, and direct the same to the clerk of the court at Washington, and deposit the packet in the post-office, or in an express office, or he may transmit the same by a messenger, whose name shall be by him indorsed on the packet.

Sec. 6. If the officer's fees be not paid at the time of taking the deposition, he should indorse on the outside of the packet the gross amount of his fees and disbursements, and inclose inside a detailed statement thereof. The packet must not be opened until the party for whom the depositions were taken deposits with the clerk the amount indorsed thereon. The clerk will then open the packet,

and tax the officer's charges at the rates hereinafter provided, and will immediately transmit to him the amount taxed, returning the overplus, if any, to the party. The money will be transmitted by draft or registered letter, and the clerk will retain his vouchers therefor.

Sec. 7. The fees shall be three dollars a day for attending to take the depositions, and twenty cents a folio of one hundred words for taking and returning it; but this *per diem* allowance is limited to one day for a deposition or series of depositions taken in the same case. Short-hand reporters, acting as special commissioners, will receive, in addition to these fees, ten cents a folio for writing out the deposition from their notes.

Sec. 8. Any permanent commissioner charging in excess of the prescribed fees, except under a previous written agreement with the parties, will be deemed guilty of improper and illegal conduct, and his commission will be revoked.

FORM NO. 275.

Findings of fact, conclusion of law, opinion and judgment thereon.

Swift & Courtney & Beecher Company
v.
The United States.[1]

FINDING OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. The claimant is a corporation organized under the laws of the state of Connecticut April 20, 1870, and from May 6, 1870, to December 20, 1878, and subsequently, was a manufacturer of friction matches, furnishing, without expense to the United States, in suitable form, approved by the Commissioner of Internal Revenue, its own dies and designs for stamps to be used thereon.

II. On the 17th of May, 1870, said company furnished to the Commissioner, as security for the payment for stamps to be deliv-

[1] For the purpose of illustrating the practice, we copy this *actual* case before the court, after its submission upon the merits.

ered by him to said company on credit, its own bond, with sureties, in the penal sum of $30,000, payable to the United States upon the following conditions therein contained:

The condition of the foregoing obligation is such that whereas the said Swift & Courtney & Beecher Company is a manufacturer of friction matches, cigar-lights or wax tapers; and whereas, under the provisions of the 161st section of an act entitled "An act to provide internal revenue to the government to pay interest on the public debt, and for other purposes," approved June 30, 1864, the Commissioner of Internal Revenue is authorized from time to time to furnish, supply and deliver to any manufacturer of friction or other matches, cigar-lights or wax tapers a suitable quantity of adhesive or other stamps such as may be prescribed for use in such cases without prepayment therefor, on a credit not exceeding sixty days, requiring in advance such security as he may judge necessary to secure payment therefor to the treasury of the United States within the time prescribed for such payment; and whereas adhesive stamps have been delivered or hereafter may be delivered to said Swift & Courtney & Beecher Company by virtue of said authority:

Now, therefore, if the said Swift & Courtney & Beecher Company shall, on or before the tenth day of each and every month, make a statement of their account upon Form 55½ of the Internal Revenue Bureau, and upon such other form or forms as may hereafter be added thereto or substituted therefor, showing the balance due at the commencement of the month, the amount of stamps received, and the amount of money remitted by them during the month, and the balance due from the Swift & Courtney & Beecher Company at the close of the month next preceding . . . and shall do and perform all other acts of them required to be done in the premises, according to law and regulations; shall well and truly pay or cause to be paid to the Treasurer of the United States, for the use of the United States, all and every such sum or sums of money as the said Swift & Courtney & Beecher Company may owe to the United States for adhesive stamps which have been or shall be delivered to them, or which have been or shall be forwarded to them according to their request or order, within the time prescribed for payment for the same according to law, and shall and will pay or cause to be paid to the said Treasurer, for the use aforesaid, each and every such sum of money as shall become due or payable to the United States, at the time and on the days each sum shall respectively become due and payable, then the above obligation to be void and of no effect.

Similar bonds were furnished May 24, 1870, for $30,000; February 29, 1872, for $30,000; and December 14, 1872, for $150,000.

III. The uniform course of business between the parties, in relation to ordering, forwarding, making returns, accounting and paying for stamps, was as hereinafter set forth:

1. Whenever stamps were desired, the claimant sent an order in the following form:

OFFICE OF THE SWIFT & COURTNEY & BEECHER CO.,
MATCH MANUFACTURERS,
[Date.]

Com. of Inter. Rev., Washington:

DEAR SIR: Please forward us by express $3000 worth [or whatever quantity was required] of match stamps S. & C. 1c., and oblige,

Yours truly,

The Swift & Courtney & Beecher Co.
L. S. Benton, Att'y.

2. The Commissioner in reply forwarded stamps of the face value of the amount of, and ten per cent. commission on, the money specified in the order, accompanied by a letter in the following form, except the words inclosed in brackets, which are inserted here as explanatory of the method of computing commissions; taking an order of $3000 as a specimen:

(OFFICE FORM 113—STAMP DIVISION.)

Invoice of documentary and proprietary stamps.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, [date.]

SWIFT & COURTNEY & BEECHER CO.:

GENTLEMEN: I have this day forwarded to you by express United States internal-revenue private-die stamps of the face value of thirty-three hundred dollars [or a sum equal to the amount of, and ten per cent. commission on, the amount of money specified in the order], in satisfaction of Order No. .

When the stamps come to hand they should be carefully counted in the presence of a disinterested witness, and if the invoice is found correct you will date, sign and transmit to this office by first mail the inclosed receipt.

If the stamps fail to come to hand within a reasonable time, please notify this office.

Very respectfully,

, Commissioner.
, Chief of Stamp Division.

3. The receipt referred to in such letter was prepared by the Commissioner, forwarded to the claimant corporation, and by it signed and returned to the office of the Internal Revenue Bureau, and was in the following form:

(OFFICE FORM NO. 44—STAMP DIVISION.)

Receipt for documentary and proprietary stamps.

[Date.]

SIR: Your letter of the has been received. I am also in receipt of the United States internal-revenue stamps therein referred to, amounting to thirty-three hundred dollars [or a sum equal to the amount of, and ten per

cent. commission on, the amount of money specified in the order] in satisfaction of my order under date of .

I am, very respectfully,

The Swift & Courtney & Beecher Co.

L. S. Benton, Att'y.

To Commissioner of Internal Revenue,

Washington, D. C.:

No. , 3000.

NOTE.—This receipt should be signed and forwarded to Washington by first mail. The signature should be legally and technically correct, so as to bind the person, firm or corporation ordering and receiving the stamps.

4. The claimant throughout availed itself of the credit provided for by statute. No order for stamps was ever for a less quantity than $500 of face value. Remittances of money in payment were made in various sums from time to time within the sixty days credit. Each remittance was for a sum not less than $500, did not specify and correspond to any one particular and specified order for stamps, but did apply to orders the times for payment of which were near maturity.

The remittances were so made that all stamps received were thus paid for at or before the expiration of term of credit allowed.

The claimant was always indebted to the defendants for stamps received within the past sixty days, the time for payment for which had not matured, but was never indebted for any stamps received more than sixty days previously.

5. Remittances of money and acknowledgments of receipt thereof were made in the following forms:

THE SWIFT & COURTNEY & BEECHER CO.,

[Date.]

Hon. GREEN B. RAUM,

Com. Inter. Revenue, Washington, D. C.:

DEAR SIR: Enclosed please find Assist. Treas. C. D. [certificate of deposit] No. 39 for two thousand five hundred ($2500) dollars [or other sum], which pass to our credit.

The Swift & Courtney & Beecher Co.

, Manager.

(OFFICE FORM 80.)

Authority to take credit on Form 55½.

TREASURY DEPARTMENT,

OFFICE OF INTERNAL REVENUE,

[Date.]

SWIFT & COURTNEY & BEECHER CO.,

Philadelphia, Pa.:

SIR: The following credit has this day been given you on the books of this office on account of internal-revenue adhesive stamps, viz.:

By duplicate certificate of deposit No. 89 of the Asst. Treas. , dated , for $2500
Commission, @ 10 per cent., ... 250

Total, ... $2750

You are hereby authorized to take credit for the above amount on Form 55½ for the current month.

Very respectfully,

, Commissioner.

6. In compliance with directions thus given by the Commissioner and with Form 55½, the complainant made its first return July 8, 1870, and regularly thereafter each month during the whole period. These returns, with like statements in gross made by the Commissioner, were forwarded by the latter to the Auditor of the Treasury, and accounts thereon were from time to time stated by him, and transmitted to the First Comptroller, by whom the balances found due were certified in the manner that accounts are adjusted, and settled in the Treasury Department.

7. From the commencement the Commissioner of Internal Revenue held that the amount allowed by statute was to be computed as commissions upon the amount of money paid; and all business between the parties was transacted, and all accounts were stated and adjusted, by the accounting officers on that basis.

8. The blank forms of 55½ were furnished by the Commissioner to the claimants, who filled them up and returned them in accordance with the Commissioner's directions and decision.

9. The first return thereon in which commissions were stated was as follows:

(55½.)

The United States in account current with the Swift & Courtney & Beecher Co., of Wilmington, Del., for the month ending July 31, 1870, under official bond dated , for $60,000.

To cash deposited as per certificate No. 1421	$10,000	By balance from last month	$16,475
Commission, per certificate on same	1,000	By stamps rec'd on order dated July 30	5,475
Balance due United States	10,950		
	$21,950		$21,950

The above account is complete and true.

Dated August 9, 1870.

The Swift, Courtney & Beecher Co.,
By Wm. H. Swift, Treasurer Match Manufacturers.

10. The last return made before the commencement of this action was as follows:

(55½.)

The United States in account current with Swift & Courtney & Beecher Co., of New Haven, Conn., for the month ending December 31, 1878, under bond dated December 14, 1872, for $150,000.

Dr.				Cr.			
		To cash deposited, as per certificate:				By balance from last month.....	$106,700
						By stamps received on order:	
Dec'r	2	No. 5827 Wilmington	$5,000			No. 6676 ag New Haven.....	2,200
	3	5821 Philadelphia.....	2,500			6692 Chicago	3,300
	3	—— New Haven	2,000			6700 Wilmington.....	5,500
	6	5834 Wilmington	5,000			6704 Philadelphia.....	2,750
	9	810 New Haven	2,000			6711 New Haven.....	2,200
	9	96 Chicago	3,000			6721 Wilmington.....	5,500
	11	31 Philadelphia.....	2,500			6746 New Haven.....	2,200
	13	5840 Wilmington.....	5,000			6745 Chicago	3,300
	13	815 New Haven.....	2,000			6750 Philadelphia.....	2,750
	18	To commission on amount deposited: 821 New Haven	2,000			6762 Wilmington.....	5,500
						5768 New Haven.....	2,200
	18	103 Chicago	3,000			6789 Chicago	3,300
	20	39 Philadelphia	2,500			6794 New Haven.....	2,200
	26	5851 Wilmington.....	5,000			6800 Philadelphia.....	2,750
	26	109 Chicago.....	5,000				
	30	51 Philadelphia	2,500				
	30	834 New Haven	2,000				
		To commission @ 10 per cent	5,100				
		Balance due United States.....	96,250				
			$152,350				$152,350

The above account is correct, complete and true.

Swift & Courtney & Beecher Co., Match Manufacturer.

Wm. H. Swift, Treasurer.

Dated January 8, 1879.

NOTE.—The face value of stamps must always be inserted in the credit side of this account.

The monthly intervening returns were in like form as the above.

11. Such returns, with the Commissioner's statement coinciding therewith, having been transmitted to the accounting officers, were settled and adjusted from time to time, as was the following account, which is inserted here as a specimen of all:

TREASURY DEPARTMENT, FIFTH AUDITOR'S OFFICE,
July 6, 1872.

I hereby certify that I have examined and adjusted an account between the United States and The Swift & Courtney & Beecher Co., match manufacturers, internal-revenue stamp agents at Wilmington, Del., for the quarter commencing Oct. 1, 1871, and ending Dec. 31, 1871, and find them chargeable therein, as follows:

Bond { $30,000, dated May 17, 1870.
{ 30,000 " " 24, 1870.

To balance due from them per report No. 2939 (register's certificate), ... 39,050

To stamps, as per receipt dated in Oct., 1871, . . . 24,200

" " Nov., 1871, . . 26,950

" " Dec., 1871, . . . 24,200

" " Jan. 2, 1872, . . 1,650

116,050

Amount brought forward, ...		$116,050
I also find them entitled to credit as follows:		
No. 2536, covering warrant No. 242, 4 quarter, 1871, .	1,500 00	
No. 1935, " " " " " " " 1, .	5,000 00	
No. 2553, " " " " " " " 1, .	1,500 00	
No. 1947, " " " " " " " 1, .	5,000 00	
No. 1957, " " " " " " " 1, .	5,000 00	
" 2570, 496, " " 1, .	1,500 00	
" 1973, " " " 1, .	5,000 00	
" 2583, " " " 1, .	1,500 00	
" 1982, " " " 1, .	6,000 00	
" 2594, " " " 1, .	1,500 00	
" 1995, " " " 1, .	5,000 00	
" 2608, " " " .	1,500 00	
" 1997, 754, " " 1, .	5,000 00	
" 2616, " " " .	1,500 00	
" 2013, " " " 1, .	5,000 00	
" 2629, " " " 1, .	1,500 00	
" 2014, " " .	1,000 00	
" 2640, " " " 1, .	1,500 00	
" 2025, " " .	5,000 00	
" 2650, " " " 1, .	1,500 00	
By ten per cent. commission on amount deposited, . .	6,200 00	
		68,200
Leaving balance due the United States with which they are to be charged, ...		47,850

As appears from the account and vouchers herewith transmitted for the decision of the Comptroller of the Treasury thereon.

J. H. Ela, Auditor.

To the First Comptroller of the Treasury.

Treasury Department, Comptroller's Office,
July 16, 1872.

I admit and certify a balance of forty-seven thousand eight hundred and fifty dollars as due the United States, as stated in the foregoing report.

Wm. Hemphill Jones, Acting Comptroller.

To the Register of the Treasury.

Notices of such settlements were forwarded to the claimants by mail.

IV. Prior to June 30, 1866, the leading manufacturers of matches, among whom was William H. Swift, who, upon the organization of the claimant corporation in 1870, became one of its large stockholders and treasurer, made repeated protests to the officers of the Internal Revenue Bureau against the method of computing com-

missions for proprietary stamps sold to those who furnish their own dies and designs.

But it does not appear that any one in behalf of the claimant corporation ever, after its organization, made any protest or objection against the method adopted by the Treasury Department for the computation of such commissions, or made claim to any allowance on account thereof beyond what had been accorded to them, until January 8, 1878, when the following correspondence took place:

WASHINGTON, D. C., Jan. 8, 1879.

Hon. GREEN B. RAUM,
Com'r of Int. Rev.:

SIR: I have the honor to state that The Swift & Courtney & Beecher Co. manufacture matches and use their own proprietary stamps. They claim that there is due to them from your office the sum of $35,822 50 as commissions upon stamps purchased as provided in section 3425 of the Revised Statutes. I have the honor to ask on behalf of said company, and as their attorney, for the payment of said sum due as aforesaid.

Very respectfully,
George H. Williams.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, January 16, 1879.

SIR: Your letter of the 8th inst., stating that The Swift & Courtney & Beecher Co., manufacturers of matches, claim that there is due them the sum of $35,822 50 as commissions upon stamps purchased as provided in section 3423 of the Revised Statutes, and asking on behalf of said corporation that payment of said sum be made, has been received.

In reply I have to say that The Swift & Courtney & Beecher Co. has received all commissions upon stamps to which they are entitled, provided the method of computing commissions which was inaugurated with the first issue of private-die proprietary stamps, and has been continued by each of my predecessors, is correct.

I have heretofore decided to adhere to the long-established practice of the office in this regard until there shall be some legislation or a judicial decision to change it.

In the absence of such legislation or judicial decision the claim made by you in behalf of The Swift & Courtney & Beecher Co. is hereby rejected.

Respectfully,
Green B. Raum, Commissioner.

George H. Williams,
Attorney, Washington, D. C.

V. From May 6, 1870, to December 24, 1878, the claimant corporation received from the Commissioner of Internal Revenue proprietary stamps printed from its own private dies of the face value of three million eight hundred ninety-seven thousand two hundred four dollars ($3,897,204). These were received in fulfillment of more than sixteen hundred orders for different amounts, varying from $500 to $10,000, in form as set forth in paragraph 1 of Finding III.

Each remittance of said stamps exactly covered in face value the amount of, with ten per cent. commission added to, the money specified in an order, and the claimant was notified thereof by letter in the form set out in paragraph 2 of Finding III.

Each receipt of said stamps in reply to said orders was acknowledged by the claimant by a letter, printed blank for which was furnished by the Commissioner, and was in form as set out in paragraph 3 of Finding III.

All these stamps so received by the claimant were paid for at or before the expiration of sixty days after their receipt, in manner set forth in paragraphs 5, 6 and 7 of Finding III.

VI. 1. Stating accounts between the parties, for the purposes of this case, at such periods of time as either party considered at the trial to be material, the following facts appear:

Whole face value of stamps delivered from May 6, 1870, to November 21, 1878 (sixty days before action brought),		$3,836,544
Paid for within sixty days after purchase:		
By cash,	$3,487,767	
By commissions on money paid,	348,777	
		3,836,544
Difference between amount of discount at ten per cent. on the face value and the amount actually allowed as commissions on the money paid,	34,878	
2. Whole face value of stamps delivered from Nov. 21, 1872, for six years, up to Nov. 21, 1878,		3,147,944
Paid for within sixty days after purchase:		
By cash,	2,861,767	
By commissions on money paid,	286,177	
		3,147,944
Difference between amount of discount of ten per cent. on face value and the amount actually allowed as commissions on the money paid,	28,816	

CONCLUSION OF LAW.

Upon the foregoing findings, the court decides as a conclusion of law that the claimant corporation is not entitled to judgment in its favor and that its petition must be dismissed.

Richardson, J., delivered the opinion of the court:

When this case was first submitted at a former term of the court it was upon demurrer to the claimants' petition, and the single question then considered was whether or not the method of computing commissions on stamps sold to proprietors of matches and other proprietary articles who furnished their dies, adopted and long followed by the Internal Revenue Bureau and the Treasury Department, should be sustained.

Without at that time expressing an opinion as to the correctness of the rule, in passing judgment upon the demurrer, and without then much considering it, but regarding it, if not clearly correct, at least not free from ambiguity and doubt, we felt, on the authority of Mr. Alexander's case (12 Wall 177) and Pugh's case (99 U. S. 265), that we were not authorized to overthrow a construction of the statute so long acquiesced in by all parties concerned, in transactions of such great magnitude, and involving such large pecuniary interests, and we therefore sustained the demurrer.

Upon appeal, the Supreme Court, from the course of the argument at the hearing there, and certainly not from any concession ever made by the officers of the Internal Revenue Bureau, or by any other officers of the Treasury Department, regarding it as "virtually admitted that the contention on the part of the appellant [the claimant] upon the provisions of the statutes is correct," held, as has often been held by that court and by this, that "the rule which gives determining weight to contemporaneous construction put upon a statute by those charged with its execution applies only in cases of ambiguity and doubt." Applying the rule to the case as virtually admitted in the Supreme Court, the judgment of this court on demurrer was reversed (105 U. S. R. 691). It could not have been otherwise under those circumstances, when the contention of the officers of the Treasury Department was thus abandoned.

In point of fact the officers of the Internal Revenue Bureau and of the Treasury Department charged with the execution of the law have always strenuously maintained that the rule adopted by them

was in accordance with the will of Congress as shown by the course of legislation.

The first internal-revenue act, passed July 1, 1862, authorized the Commissioner to sell adhesive stamps therein provided for, and to make an allowance to purchasers of not exceeding 5 per cent. "as commission," with a proviso that proprietors of the proprietary articles named, who should furnish their own dies or designs, should be allowed a "discount" of 5 or 10 per cent., according to the amounts purchased. (Ch. 119, § 102, 12 Stats. L. 477.)

The two words, commission and discount, are not synonymous. They are similar, but not identical. "Commission," in its technical as well as in its ordinary sense, generally signifies a percentage *upon the amount of money involved in the transaction*, as distinguished from "discount," which is a percentage *taken from the face value* of the security or property negotiated. (Bouvier's Law Dictionary, under "Commissions," Ficklin's National Arithmetic, 2d Book Advanced, paragraph 356, and other standard mathematical works.)

The Commissioner of Internal Revenue understood that Congress intended to use the two words in their distinct significations, as expressing two distinct methods of allowance. Accordingly, when he issued his first circular, after the bureau was fairly organized, on the 12th of January, 1863, he gave notice that a commission would be allowed on adhesive stamps of 2 per cent. on purchases of $50, 3 per cent. on $100, 4 per cent. on $500, and $5 per cent. on $1000, *payable in stamps*. (Boutwell's Direct and Excise Tax System, p. 391.) This language did not artistically express the idea of "commission," but such was its practical effect. A percentage on the face value of stamps, payable in stamps, exactly equals a percentage on the money involved in the transaction, and so is strictly and technically a "commission."

No reference was made in this circular to the sale of proprietary stamps, and it seems to have been understood that Congress intended to apply to them a different rule of allowance. But in less than two months, on the 3d of March, 1863, Congress, by express enactment, changed the word "discount" in the act of 1862 to "commission" by striking out the one and inserting the other, at the same time providing for a uniform commission of 10 per cent. on the whole amount, instead of 5 per cent. on small and 10 per cent. on large purchases. (Ch. 74, 12 Stats. L. 718.)

This change of percentage in the allowance for the purchase of proprietary stamps from "discount" to "commission" certainly appears to have been made for the sole purpose of altering the law and sanctioning the construction given by the Commissioner, otherwise it was of no practical effect. If the percentage was to be computed upon the face value of the stamps after the word "commission" took the place of "discount," then it was discount still, and the express alteration of the statute made no change in the law, and was as idle and useless in practical effect as it was inappropriate and inaccurate in language.

Whether or not the whole phraseology of the section of the statute was aptly chosen in every particular to express the correct idea of commission, it can hardly be conceived that Congress intended to allow *discount* after having stricken out that word and put in its place one susceptible of a different signification.

The Internal Revenue Bureau and the officers of the Treasury Department very naturally regarded the change in language as effecting a change in the law, and they have ever since allowed purchasers of proprietary stamps, who furnish their own dies, not a "discount" from the face value of the stamps purchased, but a "commission" computed on the amount of money involved in the transaction, and all the dealings of the parties have been in that more accurate form of account instead of by the formula of "payable in stamps," as the findings show.

This construction was acquiesced in by purchasers of proprietary stamps without objection after the year 1866 to near the time of bringing this action.

The decision of this case as it is now before us does not necessarily turn upon the correctness of the practice of the Treasury Department in the method of computing commissions, and we have thus reviewed the subject in order to show that the officers charged with the duty of administering the law from its first enactment to the present time have acted not without reason and due consideration, nor without the apparent sanction of Congress.

Upon the right to recover at the trial on the demurrer, the Supreme Court had before it only the petition of the claimant, admitted by the demurrer to be true for the purposes of that hearing. Of this they say, "the case made by the petition is not that of successive and independent purchases of stamps, settled for at the

time when the commissions given by the law were paid by the Commissioner, the purchaser voluntarily accepting payment, not in money, but in other stamps; and new dealings of the same character, but separate as to each instance, had, afterwards, upon the same footing and by mutual understanding. On the contrary, the business was conducted upon the footing of a running account."

The court further say that the dealing as presented by the petition "does not prove that he [the proprietor] was willing to waive his right to a commission upon the stamps so purchased. And it would be incumbent on the government, in order to deprive him of his statutory right, not only to show facts, from which an agreement to do so might be inferred, but an actual settlement based upon such an understanding."

Since the final decision upon the demurrer, the defendants have had leave to answer over and have filed a plea of general issue, and the real facts have been proved by the parties and found by the court, and we are now called upon to apply to these facts the rules of law laid down by the Supreme Court.

It now appears from these findings that the dealings of the parties disclose a case not only entirely different from, but exactly the opposite to, that implied from the allegations in the petition alone upon which the Supreme Court was then called upon to pass judgment. It is shown that those dealings were successive and independent purchases, upon written orders fulfilled by the delivery of stamps of the face value of 10 per cent. more than the money order; that in each case those stamps were received and receipted for by the claimant, *in satisfaction* of the order; that within sixty days each order was paid for on that basis; that there was no running account beyond sixty days' credit, or beyond the monthly settlements which were made on the basis of the orders and correspondence and upon the returns signed by the claimant and forwarded to the Commissioner, and that the accounting officers made frequent statements of balances on the same basis.

The Supreme Court say, "it would be incumbent on the government not only to show facts, from which an agreement might be inferred, but an actual settlement based upon such an understanding."

In our opinion the government has now done both. The written contract set forth in the bond (Finding II.) was that the claimant

corporation should on or before the tenth day of each and every month make a statement of their account upon Form 55½, showing the balance due at the commencement of the month, the amount of stamps received, and the amount of money remitted by it during the month, and the balance due from it at the close of the month next preceding; and also that the company should pay all and every sum or sums of money it might owe the United States for stamps delivered or forwarded to it "according to their request or order, within the time prescribed for payment for the same according to law;" that is, each purchase was to be paid for within sixty days of delivery of the stamps.

The statute fixed a limit to the term of credit for each purchase, and this agreement fixed in addition thereto the terms of settlement, not payment merely, but an accounting between the parties, an accord and satisfaction. So the parties always did their business from the commencement without objection on the part of the claimant for nearly nine years and until this action was about to be instituted. We will review the course of business.

Each purchase of stamps was upon a written order, separate and distinct from all other purchases. The claimant ordered, say, "three thousand dollars' worth of match stamps," as shown in paragraph 1 of Finding III. The Commissioner thereupon forwarded stamps of the face value of $3300, with a letter stating that they were *in satisfaction* of the order referred to (paragraph 2 of Finding III.), and the claimant, in writing signed by its proper officer, returned an acknowledgment of the receipt of stamps of the face value of $3300, *in satisfaction* of the order for three thousand dollars' worth of stamps. (Paragraph 3 of Finding III.)

These are facts from which an agreement may not only be inferred, but which must be held to constitute an explicit contract, a sale and purchase at a price fixed and agreed upon by the parties.

The course of business subsequent to the delivery of stamps and to the acknowledgment by the claimant, reaffirms the contract as thus understood by the parties. The claimant was to pay for each delivery within sixty days, and so it always did. At the end of each sixty days after the fulfillment of an order that order was invariably paid.

In one sense there was a running account for sixty days; that is, as to terms of payment. After the first order was given, and

before the sixty days for payment had expired, there were many intervening orders of like kind. It was not convenient to send a separate remittance of money in payment for each separate delivery of stamps, when, as the findings show, more than sixteen hundred such deliveries were made, and the claimant accordingly made remittance in sums to suit its own convenience, taking care always that full payment should be effected before the term of credit on any one order had expired. If at any time a remittance covered more than was payable at its date, it was practically a payment of what had matured, and the balance went towards payment of the next maturing order. In so large a business the parties did not stop to adjust each transaction separately. But they did settle each month, as we have shown; and such settlements were recognized by the correspondence had upon each remittance of money, as well as agreed upon in the bond, and were regularly made every month throughout the whole period of nine years. In acknowledging each remittance the Commissioner gave the claimant credit for the money remitted, with 10 per cent. added thereto as commissions, and authorized it "to take credit for the above amount on Form 55½ for the current month," as shown by paragraph 5 in Finding III.

As to periods of settlement, accord and satisfaction, we may therefore consider that there was a running account for each period of one month, as appears from the specimen monthly account-current set forth in paragraph 10 of Finding III. These accounts-current were regularly sent forward to the accounting officers, and by them adjusted and balances stated from time to time in accordance with the practice of the Treasury Department, of which the claimant had due notice.

There was not such a general running account between these parties for the period of nine years from the commencement of their dealings as entitles the claimant to a statement of its whole account for that time, opening its own monthly settlements and the settlements of the accounting officers, setting aside its own sixteen hundred contracts, and making to it a greater allowance than was from time to time agreed upon, even if it would have been entitled to such greater allowance had it not otherwise contracted.

In our opinion, under the rules laid down by the Supreme Court in this very case, as well as in the case of Francis E. Pray, decided

by that court at the present term, the claimant corporation is concluded by its own agreements and settlements; that it has no cause of action, and that its petition must be dismissed.

In this result the claimant suffers no injustice. It is to be presumed, from its long acquiescence in paying for stamps in the manner and to the extent shown by the findings, that it added the whole amount thus paid in taxes to the value of its articles manufactured, and charged the same to the purchasers. If so, the consumers finally paid the taxes, while the money recovered back, if any, would go not to the consumers, but to the claimant as extra and unexpected profits.

Judgment will be entered dismissing the petition.

FORM NO. 276.

Judgment for claimant.

David Graham
v.
The United States.

The court, on due consideration of the premises, do find for the claimant, and do adjudge and decree that the said David Graham do have and recover of and from the United States the sum of $.

FORM NO. 277.

Judgment for defendants.

James Swift
v.
The United States.

The court, on due consideration of the premises, find for the defendant, and do order, adjudge and decree that the claimant's petition be dismissed.

FORM No. 278.

Order on motion for intervention.

William Fielding
v.
The United States.

Upon the motion of John Donally and James Boston for leave to intervene herein, it is ordered that the motion be overruled.

FORM No. 279.

Ruling upon a motion for a new trial.

Albert Kellogg
v.
The United States.

The motion of the plaintiff herein for a new trial in this case is overruled.

FORM No. 280.

Judgment confirming report of referee and decree thereon.

John Campbell
v.
The District of Columbia.

Upon motion of Mr. Dyer for the claimant, for a confirmation of the report of C. D., referee, herein filed, and for judgment thereon, said report is confirmed. And the court, on due consideration of the premises, find for the claimant, and order, adjudge and decree that the said John Campbell do have and recover to the use of Samuel Campbell in the manner provided by the act of June 16, 1880, chapter two hundred and forty-three, the sum of , upon debts of the District of Columbia, due and payable December 20, 1875, within the meaning of the sixth section of the said act.

FORM No. 281.

Certified transcript of pleadings, findings, etc.

A. B.
v.
The United States.

I, , clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this day of , 18 .

, Clerk Court of Claims.

FORM No. 282.

Attested judgment.

A. B.
v.
The District of Columbia.

At a Court of Claims held in the city of Washington, of , A. D. 18 , judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant , and do order, adjudge and decree that the said have and recover in the manner provided by the act of June 16, 1880, chapter 243, upon debts of the District of Columbia due and payable within the meaning of the sixth section of said act.

A true copy of record.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this day of , A. D. 18 .

, Clerk Court of Claims.

Attest:

, Chief Justice.

FORM NO. 283.

Certified judgment.

A. B.
v.
The United States.

At a Court of Claims held in the city of Washington, of , A. D. 18 , judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant , and do order, adjudge and decree that the said have and recover of and from the United States the sum of .

A true copy of record.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this day of , A. D. 18 .

, Clerk Court of Claims.

Attest:

, Chief Justice.

FORM NO. 284.

Application for appeal and order allowing same.

A. B.
v.
The District of Columbia.

From the judgment rendered in the above-entitled cause on in favor of claimant, the defendants, by their Attorney General, on the day of , 18 , make application for, and give notice of, an appeal to the Supreme Court of the United States. , Attorney General.

A. B.
v.
The District of Columbia.

Filed .

Ordered by the court that an appeal be allowed in the above-entitled cause to the Supreme Court of the United States. [If allowed

by the Chief Justice in vacation, say: An appeal to the Supreme Court in this cause is allowed this day of , 18 .]

, Chief Justice.

FORM No. 285.

Application for appeal and order allowing same.

A. B.
v.
The United States.

From the judgment rendered in the above-entitled cause on in favor of claimant, the defendants, by their Attorney General, on the day of , 18 , make application for, and give notice of, an appeal to the Supreme Court of the United States.

, Attorney General.

Filed .

[Order of allowance as in No. 284.]

INDEX.

The references are to pages.

ACTIONS AT LAW. See *Procedure; Evidence.*
when production of books and papers by parties may be compelled, 433.
practice; notice and motion to produce, note, 433.

ADMIRALTY. See *Pleading; Practice and Procedure; Appeals.*
general principles, 70.
the libel, what it should contain, 70.
must be filed before process can issue, 70.
the mesne process, 71.
where there are several claims, 71.
suits against a ship, her tackle, etc., 72.
order for process to issue, 72.
stipulation for costs, 72.
when bail may be reduced, 73.
when new sureties may be required, 73.
process of arrest and attachment, 73.
garnishment, 73.
how attachments may be dissolved, 73.
bond in case of, 73.
when the marshal may take bail, 74.
stipulation for costs, 74.
decree against stipulators, 74.
when execution may issue, 74.
when warrants of arrest cannot issue, 74.
the claim, pleading of intervenor, 75.
how claimant may obtain the property, 75.
where the property is owned severally or jointly, 75.
claimant should file his claim on the return day of the process, 76.
claim and answer, 76.
the claim must be verified, 76.
stipulation for costs to be filed by claimant, 76.
when the arrested ship will be delivered to claimant, 76.
appraisement of the vessel, when conclusive, 77.
perishable goods may be sold, 77.
right of claimant to property not absolute, 77.
in case of appeal the thing does not follow the appeal, 77.
where a state court has property in custody, federal courts will not interfere by a proceeding in rem, 78.
information or libel on seizures, 78.
what it must contain, 78.
what it must aver, 78.
amendments of, 78.
a master may put in a claim as bailee for the owner, 79.
claim and verification not conclusive, 79.
how decrees in admiralty may be enforced, 79.
in prize causes district and circuit courts have cognizance of, 79.
the court may decree restitution of whole or part of captured property, 80.
may decree damages for detention, 80.
where seizure must be made, 80.
process in case of seizure, 80.
condemnation of property employed in aid of insurrection, 81.

ADMIRALTY—*continued.*
statutory provisions for condemnation of property, both real and personal, 81.
authority of court over funds derived from confiscated property, 81.
distinction between instance and prize causes, 81.
seizures cognizable in the district court of the district into which the property may be first taken, 82.
trial by jury, except in cases in equity and of admiralty and maritime jurisdiction, 82.
right of trial by jury may be waived, 82.
libels in instance causes, 83.
libels should show facts conferring jurisdiction, 83.
should state grounds of forfeiture, 83.
amendments of pleadings, 83.
the court may require defendant to give security for costs in certain cases, 84.
answers and verification, 84.
exceptions to libel and answer, 85.
default on failure to answer, 85.
when further answer will be required, 86.
what defendant may object to answer, 86.
defendant may require libellant to answer interrogatories, 86.
when verification of an answer may be dispensed with by the court, 87.
new facts in the answer treated as denied by the libellant, 87.
practice in case of, 87.
when cross-bill may be filed, 87.
respondents to cross-bill must give security, unless the court shall otherwise direct, 87.
when the libellant is entitled to process of foreign attachment, 88.
when attached property will be ordered to be brought into court, 88.
when the cause dismissed if the libellant fails to appear, 89.
when a decree of default may be rescinded, 89.
the proceeds of property to be paid into the registry of the court, 89.
money to be deposited in the name of the court, subject to the order of the judge, 90.
party interested may intervene for proceeds, 90.
matters may be referred to commissioners, 91.
bail on arrest, 91.
imprisonment for debt, 91.
extension of admiralty jurisdiction, 91.
rule in England not applicable in this country, 93.
embezzlement by master of vessel, 93.
liability of owner limited by statute, 93.
proof made before commissioner in case of, 94.
owners may contest their liability for, 95.
further proof may be taken on appeal to the circuit court, 95.
when district courts may regulate practice, 96.
appeals in to Supreme Court, 246.
where matter in dispute exceeds $5000, 246.
from final decrees, 246.
what decrees are not final, 247.
within what time taken, 251.
when want of jurisdiction is apparent of record, 251.
appellant has a right to dismiss, 252.
when dismissed of course, 252.

AMENDMENTS. See *Practice and Procedure in Suits of Law; Practice and Procedure in Equity.*
of bills when of course, 196.
after answer or plea, 197.
when filed after order of allowance, 198.
of bills after demurrer, 200.
process when allowed, 514.
process, returns and pleadings, etc., 515.

ANSWER. See *Practice and Procedure in Suits at Law; Practice and Procedure in Equity.*
amendments made after, 197.
plea and answer to bill, 199.
as evidence, 201.
matters of bill not denied by, taken as true in certain cases, 201.
answers must be made to interrogating part of bill if required, 202.
when the answer under oath is waived it is not evidence for defendant, except in certain cases, 202.
interrogatories defendant may decline to answer, 203.
replication to, 203.
amendment to bills after, on leave of court, 204.
when it must be filed, 210.
when amended of course, 210.
when amended only on leave of court, 211.
exceptions thereto, 211.
when set down for hearing, 211.
answer after allowance of, 212.
defendant must answer original bill before plaintiff is required to answer cross-bill, 215.

APPEAL. See *Writs of Error and Appeal.*
from district to circuit courts, 98.
time allowed for taking, 98.
what must be certified on, 99.
to the Supreme Court, 100.
by both parties, 100.
directing mandate to issue to inferior federal court, 287.
may affirm, modify or reverse decision of a state court and issue execution thereon, 287.
mandate conclusive, 287.
may be revoked, 287.
costs on affirmance, 288.
reversal, 288.
dismissal, 288.
opinions, recording of by clerk, 289.
rehearing, when allowed, 289.
dismissal of suit in vacation, 290.
clerk's duty on, 290.
from the Court of Claims heard upon record, 291.
what the record must contain, 291.
rule in relation to strictly construed, 291.
petition for allowance of to the Court of Claims, 291.
order for allowance, 291.
time of, limited, 291.
proceeding in case of diminution of record, 292.
writ of certiorari may issue to compel return of the record, 292.
presumption on that judgment of inferior court is in force, note, 497.

ATTACHMENT. See *Admiralty Pleading; Practice and Procedure; Process.*
of property in admiralty, 73.
by garnishment, 73.
may be dissolved, 73.
when perishable goods may be sold, 77.
process of foreign, 88.
when property will be ordered into court, 88.
when proceeds to be paid into the registry, 89.
in common law cases to conform to state practice, 505.
in postal suits, 507.
applications for against postmasters, 507.
owner may claim, 508.

ATTACHMENT—*continued.*
property proceeds may be invested, 508.
publication of notice in case of, 509.
discharge of, bond required, 509.
dissolved in conformity with state law, 509.
property under revenue laws irrepleviable, 509.
by garnishment in favor of United States, 510.
proceedings under, 510.
garnishee failing to appear, 510.
in admiralty against garnishees, 585.
of proceeds of property, 585.

ATTORNEYS. See *District Attorneys.*
fees of, 456, 458.
negligence or fraud of no cause for setting aside judgment, 497.
liability of for costs in certain cases, 521.

BAIL. See *Procedure; Admiralty; Criminal Cases.*
by defendant, special provisions relating to, 513.
calling of in Kentucky, 513.
de bene esse, when taken by clerks, 514.

BILLS IN EQUITY. See *Practice and Procedure in Equity; Supreme Court.*
clerk's office always open for filing, 187.
subpœna, proper mesne process to require defendant to appear and answer. 189.
taken *pro confesso*, when default may be entered, 192.
frame of bills, introductory part, 193.
what may be omitted from, 193.
the prayer for relief, what it should contain, 194.
when proper parties to, beyond the jurisdiction of the court, may be omitted, 194.
what the prayer for process must contain, 195.
signature of counsel to, 195.
scandal and impertinence in, 195.
when referred to master for scandal or impertinence, 196.
amendment of, when of course, 196.
after answer, 197.
when amendment must be filed after order of allowance, 198.
demurrers and pleas to, allowance of, 198.
demurrer, plea and answer to argument on, 199.
amendment of, on allowance of demurrer, costs, 200.
effect of failure to reply to plea, 200.
effect of answer as evidence, 201.
when answer not evidence, 202.
note at foot of bill treated as part of it, 202.
interrogatories in the note, 203.
defendant may decline to answer, 203.
parties to, absent parties, 204.
non joinder of merely formal parties, 205.
when parties are numerous, 206.
when trustees and executors and administrators may represent parties beneficially interested, 206.
when an heir-at-law is not a necessary party, 207.
when defect of parties may be suggested by answer, 207.
nominal parties to, need not appear, 208.
bills of revivor and supplemental bills, 209.
when supplemental bills are proper, 210.

BILL OF EXCEPTIONS. See *Practice; Procedure.*
how authenticated, 515.

CAPITAL CASES. See *Criminal Cases.*
treason, copy of indictment in, to be delivered defendant, 417.
witness for defendant, 418.
remitted, when, 418, 419.

CERTIFICATE OF DIVISION OF OPINION. See *Division of Opinion.*
reviewed by the Supreme Court, 252.
may affirm, reverse or modify, 252.
in criminal cases, 253.
the specific point must be stated, 253.
only the points stated are properly before the court, 254.
the question must be one of law and not of discretion, 254.
in criminal cases, certificate, 254.
when the Supreme Court is divided on, 255.

CERTIORARI. See *Courts; Jurisdiction.*
writs of, note, 428.

CHALLENGES. See *Criminal Cases.*
in excess of number allowed, 417.

CIRCUIT COURTS. See *Circuits (Judicial); Jurisdiction of Circuit Courts; Practice and Procedure in Suits at Law; Practice and Procedure in Equity.*
where established, 102.
by whom held, 103.
justices of supreme to attend, 103.
judges of, may set apart and try cases, 103.
may be held at the same time in different districts, 103.
criminal terms in southern district of New York, 103.
when judges may sit to review their own opinions, 104.
when suits may be transferred to another circuit court, 104.
when a suit transferred may be certified back, 104.
when justices of may hold courts of other circuits, 104.
when no justice is allotted to, 105.
clerks appointed by the court, 105.
in Alabama, 105.
in Iowa, 105.
in Kentucky, 106.
in North Carolina, 106.
in Virginia, 106.
in Wisconsin, 106.
deputy clerks, 106.
in Indiana, 106.
compensation of, 107.
may appoint commissioners, 107.
no marshal or deputy marshal may act as commissioner, 107.
original and appellate jurisdiction of, 108–174.
practice and procedure in suits at law, 175–183.
in equity, 184–221.

CIRCUITS (JUDICIAL). See *Circuit Courts.*
First.—Rhode Island, Massachusetts, New Hampshire and Maine, 101.
Second.—Vermont, Connecticut, New York, 101.
Third.—Pennsylvania, New Jersey, Delaware, 101.
Fourth.—Maryland, West Virginia, North Carolina, South Carolina, 101.
Fifth.—Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, 101.
Sixth.—Ohio, Michigan, Kentucky, Tennessee, 101.
Seventh.—Indiana, Illinois, Wisconsin, 101.
Eighth.—Colorado, Nebraska, Minnesota, Iowa, Missouri, Kansas, Arkansas, 101.
Ninth.—California, Oregon, Nevada, 101.

CIVIL RIGHTS,
proceedings in vindication of, 432.

CLAIMS. See *Court of Claims.*

CLERKS,
appointment of, 22, 25.
residence of, 22, 25.
duties and powers of, 22–26.
appointment of deputies, 23, 27.
in Texas, 22.
in Kentucky, 22.
in Iowa, 23.
in Michigan, 24.
in Missouri, 24.
in Tennessee, 24.
compensation of, 26.
commissions, 27.
deputies, appointment of, 27.
official bond, 27.
responsibility of clerk for, 27.
compensation, how allowed and paid, 25.
duties of in special cases, 49.

of the circuit courts, how appointed, 105.
in Alabama, 105.
in Iowa, 105.
in Kentucky, 106.
in North Carolina, 106.
in West Virginia, 106.
in Wisconsin, 106.
deputy clerks, compensation of, 107.
semi-annual returns of fees, etc., required, 465.
fees and emoluments retained for personal services not to exceed $3500 a year, 467.
fees of, in California, Oregon and Nevada, 467.
additional compensation in prize causes, 468.
accounting to the Department of Justice, 468.
accounts of to be certified by district judge, 468.
must be rendered with vouchers and items, 469.
penalty for willfully refusing or neglecting to perform certain duties, 470.
expenses of, when absent from place of business as a witness for the government, 472.
fees, how paid and recovered, 474.
cannot act as solicitor, proctor, attorney or counsel in any United States court. 447.
penalty for so doing, 447.

COMMISSIONERS OF THE CIRCUIT COURTS. See *Circuit Courts.*
each circuit court may appoint, 107.
no marshal or deputy marshal can act as commissioner, 107.
circuit courts may appoint, 385.
power of, to require security to keep the peace, etc., 386.
practice before, information must be filed, 387.
proceedings on examination, 388.
recognizance of witnesses, 388.
when the prisoner must be committed, 388.
duty of commissioner to make return, 388.
may enforce award of consuls, etc., 389.
may cause the arrest of offenders against the United States, 390.
procedure against offenders, 390.
information under oath, 390.
notice to district attorney, 391.
same as state practice, 392.

COMMISSIONERS OF THE CIRCUIT COURTS—*continued.*
procedure, witnesses and fees, 392, 393.
decision of the commissioner, 393.
commitment by, 393.
waiver of examination, 393.
removal of prisoner to another district, 394.
meaning of the word "seasonably," 394.
bail, amount of, 395.
recognizance, what it should contain, 395.
extent of liability of sureties, 395.
copy of process to be returned, 396.
may discharge poor convicts in certain cases, 396.
may arrest foreign seamen in certain cases, 397.
proceedings in case of, 397, 399.
powers of, under statutes relating to equal rights, 401.
bail and affidavits may be taken before, 402.
may take depositions *de bene esse*, 402.
reasonable notice of depositions, 403.
party may waive rights, 404.
mode of taking depositions before, 404.
transmission of depositions to court, 405.
depositions must be reduced to writing by commissioner or witness, 405.
certificate to deposition, 405.
what must be shown on trial before deposition can be used, 407.
compelling witnesses to appear before, 407.
make oaths and acknowledgments, 408.
may issue search warrants in certain cases, 408.
may issue warrants for arrest of fugitives, 409.
complaint on oath before, 410.
what warrant of arrest should contain, 410.
what commissioner must certify, 410.
fees; accounts; vouchers, 411.
fees as supervisor of election, 412.
how to obtain allowance and payment, 413.
fees of, 470.

CONSTITUTION,
provisions of, relating to judicial power, 1, 4.
interpretation of, 2.
provided for federal courts, 3.
amendments construing judicial power, 4.
Mr. Jay's summary of reasons for, 5.
giving jurisdiction to the Supreme Court, 7.
original jurisdiction not exclusive, 7.
of federal courts, duty of Congress to provide for, 10.

COURTS OF UNITED STATES,
jurisdiction exclusive, 425, 435.
may issue writs, 427.
of certiorari, note, 428.
of supersedeas, note, 428.
other writs, note, 489.
may administer oaths and punish for contempts, 435.
contempt of, what is, note, 435.
by witnesses, note, 435.
by officers, note, 435.
when new trial may be granted, 436.
may issue writs of injunction, 429.
temporary restraining orders, 429.
cannot restrain state courts except, etc., 430.
when laws of state are regarded as rules of decision for, 430.

COSTS. See *Fees; Rules.*
when not recoverable if judgment is less than $500, 518.
in internal revenue cases, 519.
when claimant of property in seizure cases not entitled to, 519.
double, when allowed, 519.
in copyright suits, 519.
in patent right suits, 519.
when paid by defendant in prosecutions, 520.
when recoverable by defendant, 520.
when limited, 520.
of district attorneys, 521.
before commissioner, 521.
when attorney, etc., liable for, 521.
how taxed, bill of, 521.
sworn to, 521.
in admiralty, security for, required, 581.
on cross-bill, 590.
by intervenor, 584.

COURT OF CLAIMS,
appeal from, to Supreme Court, heard upon the record, 291.
what the record must contain, 291.
must be prepared strictly in conformity to rule, 291.
appeal can only be secured on application, and an order therefor, 291.
appeals from, must be taken within ninety days, 292.
where there is a diminution of record, 293.
writ of certiorari may issue to compel a return of record, 293.
findings of fact and conclusions of law by the Court of Claims, 293.
sovereignties cannot be sued, a fundamental principle, 314.
history of, note 4, 314.
organization and sessions of, 318.
seal of, 319.
court room, etc., how provided, 319.
sessions, when held, 320.
quorum of, 320.
officers of, 320.
salaries of clerks, bailiffs, etc., 320.
clerk's bond, 320.
clerk to disburse the contingent fund, 320.
clerk to report to Congress, 320.
pleading, practice and procedure in, 321.
jurisdiction of claims founded on acts of Congress, 321.
regulation of an executive department, 321.
upon contract, 321.
set-offs, counter-claims, etc., 321.
claims of disbursing officers, 321.
claims for captured property, 321.
claims in Congress transmitted, 322.
set-offs and counter-claims, how enforced, 322.
decree for accounting officers, 322.
procedure in cases transmitted from any head of a department, 322.
judgments in such cases, how paid, 322.
claims growing out of treaties, 324.
not to be prosecuted by parties having suit in another court for the same, 324.
in case of aliens, 324.
limitation of suits on, 324.
practice, rules of, 325.
oaths and acknowledgments, 325.
petition, what to set forth, 325, 359.
when to be dismissed, 325.

COURT OF CLAIMS—*continued.*
claims, burden of proof as to loyalty, 325, 366.
commission to take testimony, 326, 368.
power to call upon department for information, 326.
when testimony not to be taken, 326.
witnesses not to be excluded on account of color, 326.
interested, excluded, 326.
examination of claimant, 326, 371.
testimony taken where deponent resides, 327, 372.
witnesses, how compelled to attend, 327.
cross-examination of, 327, 372.
payment of judgments, 328, 376.
interest on, 328, 377.
interest on claims, 329.
payment of judgment full discharge, 329, 378.
final judgment a bar, 329, 378.
Attorney-General to transmit petition in certain cases to departments, 329.
practice; appeals to Supreme Court, 330.
time and manner of taking, 330, 379.
assignment of, 330.
on contracts of Secretaries of War, etc., 331.
three judges to constitute a quorum, 331.
costs of records, how paid, 331.
claims on Chinese indemnity fund, 332.
documents may be used, 332.
of New Mexico mounted volunteers, 332.
jurisdiction limited, 336.
United States not liable for damages sustained by the bombardment of a town, 338.
for damages for forcible possession of land, 339.
arising from a collision, 339.
no jurisdiction in equity, 339.
immunity from suit an incident of sovereignty, 339.
jurisdiction under revenue laws, 339.
where suit is on contract, 340.
or by an informer, 340.
or by a manufacturer to recover commission on stamps, 340.
jurisdiction of claims founded upon acts of Congress, 341.
arising under a regulation of an executive department, 341.
in case of a claim upon express contract, 341.
in case of a claim upon implied contract, 341.
instances of implied contracts, 341.
where the court refused to entertain jurisdiction, 341.
jurisdiction does not extend to suits against the United States for infringements of patents, 344.
in case of claims referred to it by Congress, 344.
in case of set-offs and counter-claims, 344.
must be pleaded, 345.
of claims of disbursing officer, 346.
of claims for proceeds of captured and abandoned property, 346.
presumptions in such cases, 347.
the claimant must always have been a loyal citizen, 348.
of claim for property destroyed, etc., by the army or navy, 348.
all private claims in Congress to be transmitted to, 350.
judgments for set-offs and counter-claims, how enforced, 350.
trial without jury, 351.
decrees in favor of paymasters, etc., how enforced, 351.
when head of department may cause claims to be transmitted to, 353.
procedure in cases thus transmitted, 354.
claims pending in other courts, 355.

COURT OF CLAIMS—*continued.*
aliens may prosecute in certain cases, 355.
limitation of actions in, 356.
when the time commences to run, 357.
practice, may establish rules of, 358.
parties to suit in, 360.
suit based upon assigned chose in action, 361.
pleading, practice and procedure in, 361.
petition may be amended, 364.
consolidation and intervention, practice, 365.
when cause will be remanded for further proof, 366.
burden of proof of loyalty, 366.
when the petition will be dismissed, 366.
aid and comfort to the rebellion, 367.
effect of pardon and amnesty, 367.
burden of proof, 368.
acts of aid and comfort, 368.
application for a commission, 369.
mode of taking depositions, 369.
witnesses may be re-examined, 369.
objections to, when taken, 370.
may call upon departments for information, 370.
fees of commissioner and other expenses, 371.
by whom paid, 327, 372.
claims, when forfeited for fraud, 328, 373.
decree in favor of claimant, 373.
regulations prescribed by the Supreme Court relating to appeals from the Court of Claims, 379.
application for allowance of, 379.
within what time to be made, 379.
findings of fact and conclusions of law filed, etc., 380.
when a request is made to find facts, 381.
report of commissioner of facts found, 382.
remarks of an eminent American lawyer relating to the Court of Claims, 383.

COUNSEL,
to be assigned defendant indicted for treason or other capital crime, 417.

CRIMES. See *Criminal Cases.*
punishable with death, where tried, 437.
begun in one district and completed in another, where triable, 439.
committed on the high seas, where triable, 439.

CRIMINAL CASES,
practice in, 415.
statutes relating to, 415.
indictments, 415.
offences against the elective franchise, 415.
perjury before a court-martial, 415.
charges joined in one indictment, 416.
indictments, defects of form of, 416.
several indictments against the same person, 416.
copy of mittimus to be delivered to jailer, 416.
writ for removal of prisoner from one district to another, 416.
no writ necessary to bring into court a person in custody, 417.
peremptory challenges, excess of, 417.
where a prisoner stands mute, 417.
copy of indictment, etc., to be delivered to the prisoner, 417.
counsel to be assigned to defendant, 417.
verdict for less offence than charged, 418.
verdict against part of several defendants, 418.
indictments remitted to and from circuit and district courts, 418.

CRIMINAL CASES—*continued.*
remission of cause from district to circuit court, 418.
all capital cases to be remitted from the district to the circuit court, 419.
capital case carried to the Supreme Court, 419.
judgments for fines, how collected, 419.
what crimes are infamous, 419.
not infamous, 420.
consolidation of various offences, 420.
defects of form in indictments, 421.
when copy of indictment must be delivered to the defendant, 421.
indictment for offences not capital, 422.
when defendant may be found guilty of less offence than charged, 422.
indictments remitted from circuit to district court, and *vice versa*, 422.
remission from the district court in difficult cases, 423.
fine or penalty, how collected, 424.

DEATH. See *Practice.*
of parties, practice in case of, 515, 516.

DEMURRER. See *Practice and Procedure in Suits at Law; Practice and Procedure in Equity; Supreme Court.*
to bills, amendment after allowance, 197, 200.
to plea, must have certificate of counsel, 198.
argument on, 199.
costs, when overruled, 200.
setting down for argument, 200.

DEPOSITIONS. See *Commissioners.*
de bene esse, 402.
notice of, 403.
waiver of matters, 404.
mode of taking, 404.
transmission of, 405.
reduced to writing, 405.
certificate to, 405.
conditions for the use of, 407.
compelling witness to attend for, 407.
oaths, etc., 408.

DISTRICT COURTS. See *Jurisdiction.*
constitution and organization of, 10, 19.
judicial districts, 10, 19.
records, where kept, 25.
clerks of, 22–25.
terms and sessions of, 37–53.
regular sessions of, Alabama, 37.
Arkansas, 37.
California, 37.
Connecticut, 37
Colorado, 37.
Delaware, 38.
Florida, 38.
Georgia, 38.
Illinois, 38.
Indiana, 38.
Iowa, 39.
Kansas, 39.
Kentucky, 39.
Louisiana, 40.
Maine, 40.
Maryland, 40.

DISTRICT COURTS—*continued.*
regular sessions of, Massachusetts, 40.
Michigan, 40.
Minnesota, 40.
Mississippi, 40.
Missouri, 41.
Nebraska, 41.
Nevada, 41.
New Hampshire, 41.
New Jersey, 41.
New York, 41.
North Carolina, 42.
Ohio, 42.
Oregon, 43.
Pennsylvania, 43.
Rhode Island, 43.
South Carolina, 43.
Tennessee, 43.
Texas, 44.
Vermont, 44.
Virginia, 44.
West Virginia, 45.
Wisconsin, 45.
changing time for holding, suits not affected by, 45.
always open for certain purposes in Wisconsin, 45, 46.
Florida, 46.
Indiana, 46.
adjournments for the trial of criminal cases, 46.
in other cases in Kentucky, 46, 47.
Indiana, 46, 47.
special terms, 46.
when circuit judges may act as district judges of, in Tennessee, 46.
adjournment of, in case of non-attendance of a judge, 47.
intermediate terms in California, Iowa and Tennessee, 47.
business of, certified to circuit court in case of disability of judge, 47.
duty of clerk in relation to suits brought after certificate of disability, 48.
power of judge of, rests in circuit judge in case of disability, 49.
when a circuit judge or circuit justice may act in certain cases, 50, 51.
jurisdiction of, 54–69.
special and limited, 54.
crimes and offences, 54.
in case of piracy and of suits for penalties and forfeitures, 55.
suits by the United States, 55.
suits in equity to enforce internal revenue taxes, 56.
admiralty and prize causes, 56.
suits on debentures, 96.
suits for damages against conspirators, 96.
suits to recover offices, 97.
suits to remove officers, 97.
suits against national banks, 97.
suits against consuls and vice-consuls, 97.
general principles relating to admiralty, 57.
jurisdiction of maritime liens, 58.
liens created by contract, 59.
suits by material men, 59.
suits on bottomry bonds, 61, 62.
suits for salvage, 62.
petitory suits, 63.
suits for mariners' wages, 64.
suits for pilots' wages, 65.
suits for torts, 66.

DISTRICT COURTS—*continued.*
jurisdiction, suits for collisions, 67.
suits by libel, 68.
suits for assault and battery, 68.
suits for injury to passengers, 69.
jurisdiction in bankruptcy, 98.
appeals from to circuit courts, 98.
time of taking appeals to circuit court, 98.
what must be certified by clerk on appeals, 99.
what may be omitted, 99.
appeals to Supreme Court, 100.
in prize cases, 100.
when taken, 100.
when taken by both parties, 100.

DISTRICT ATTORNEYS. See *Fees.*
appointment of, 31.
duty of, 31.
to prosecute for crimes, 33.
the recognized officer of the government, 33.
fees and compensation of, in New York, 34, 35.
in California, 35.
term and oath of office, 36.
to make semi-annual return of fees, etc., 465.
not to retain to exceed $6000 a year, 465.
compensation of, in southern district of New York, 466.
in Oregon and Nevada, 466.
in prosecutions under revenue laws, 466.
allowance made for personal expenses, 468.
must pay surplus of fees and emoluments at the time of semi-annual report, 468.
Attorney-General must cause the returns to be carefully examined, 468.
accounts of, must be certified by the district judge, 468.
must render accounts with vouchers and the items thereof, 469.
how paid, etc., 474.

DIVISION OF OPINION. See *Certificate of Division.*
review by the Supreme Court on certificate of, 252.
court may affirm, reverse or modify, 252.
in criminal cases, 253.
the specific point must be stated, 253.
only the points stated are properly before the court, 254.
the question must be one of law, 254.
certificate in criminal cases, 254.
when the Supreme Court is divided on, 255.

EQUITY. See *Writs of Error and Appeal.*
appeals in, when allowed, 246.
matter in dispute must exceed $5000, 246.
from final decrees, 246.
what decrees are not final, 247–249.
time for appeal limited, 251.
where want of jurisdiction is apparent, 251.
right of appellant to dismiss, 252.
when dismissed of course, 252.
Court of Claims no jurisdiction in, 339.
jurisdiction of United States courts cannot be sustained where there is an adequate remedy at law, 433.
practice in, note, 433.
suits in, when maintained, 433.
what should be entered upon the final record in, 447.

EVIDENCE. See *Witnesses; Depositions.*
witnesses cannot be excluded on account of color, 475.
laws of state generally rules of decision as to the competency of witnesses, 475.
of witnesses before either house of Congress or any committee of either house, when not to be used against him in a criminal proceeding, 476.
when the pleading of a party or a discovery obtained in a judicial procedure cannot be used against him, 476.
mode of proof in common law actions, 476.
equity and admiralty, 476.
depositions *de bene esse*, 477.
how taken, 478.
transmission to court, 478.
under dedimus potestatum, 478.
in perpetuam rei memoriam, 479.
subpœnas for taking, 479.
subpœnas duces tecum, 479.
when witnesses required to attend, 480.
depositions in District of Columbia to be used elsewhere, 481.
notice in case or oral examination, note, 481.
execution of commission, under Equity Rule 67, note, 481.
commission, written interrogatories filed, 481.
what the return should show, 481.
depositions in District of Columbia taken without consent, 482.
manner of taking, etc., 482.
fees of witnesses, 482.
letters rogatory from United States courts, 483.
subpœnas to run into other districts, 483.
witnesses on behalf of United States, 483.
mode of determining distance of travel, note, 483.
for indigent defendants in criminal cases, 484.
recognizance of, in criminal cases, 484.
may be required by district attorney, 484.
copies of books and papers in any executive department, when evidence, 485.
of documents, etc., in office of Solicitor of the Treasury, 486.
of papers, etc , executed by the Comptroller of the Currency, 486.
certificate of the Comptroller of the Currency of organization of national bank, 486.
transcript of books of the Treasury Department, 486.
in case of embezzlement, 487.
copies in return office of Department of Interior, 488.
of Post Office records and Auditor's statements, 488.
of records in General Land Office, 489.
Patent Office, 489.
of foreign letters patent, 489.
of specifications and drawings by Commissioner of Patents, 489.
of journals of Senate or House of Representatives, 490.
of records in office of United States consuls, 490.
of records transcribed into new books by clerks, in certain cases, 490, 491.
in case of loss of original record, 491, 492.
authentication of legislative and judicial proceedings, 493.
states may prescribe, note, 494.
seal required, note, 494.
construction of the statute, note, 494.
records, what may be, 495.
clerk's certificate, note, 495.
judge's certificate, note, 495.
effect of, note, 496.
in another state, note, 496.

EVIDENCE—*continued.*
presumption of judgment in force on writ of error or appeal, note, 497.
of a judgment is merely interlocutory, 497.
when a decree in relation to land not evidence in another state, 497.
judgments conclusive where the court has jurisdiction, 497.
cannot be impeached for the ignorance, etc., of attorneys, 497.
presumptions as to service of original process, 498.
record showing personal service of original process may be rebutted, 498.
recital of record may be controverted, 498.
of service of process out of state, 498.
by publication, 498.
in case of voluntary appearance, 499.
in case of decrees for divorce, 500.
judgments conclusive in the state where rendered, 500.
what records of public officer may be certified, 501.
copies of foreign records, 502.
Little & Brown's Edition of Statutes, 502.
burden of, in case of seizure, 503.
in case of title to mining lands, 503.

EXECUTION. See *Procedure.*
when may run into any part of the state, 522.
in favor of United States, 522.
be stayed, 522.
against revenue officers, 523.
imprisonment on, when restrained, 523.
when jail limits, allowed, 523.
when goods taken on, must be appraised, 524.
in case of death of marshal after issue of, 524.

FEES. See *Commissioners.*
of commissioners; accounts, vouchers, 411.
provisions of the statute relating to, 556–465.
of attorneys, solicitors and proctors, 456–458.
of district attorney in suits under the revenue laws, 458.
in defending revenue laws, 458.
of clerks, 458.
of marshals, 460.
in particular cases, 463.
of officers—no per diem allowance, 464.
semi-annual return of, to be made to Attorney-General, 465.
what to be included by district attorney and marshal, 465.
district attorney not to retain fees exceeding $6000, 465.
of district attorney of southern district of New York, 466.
and marshal of Oregon and Nevada, 466.
in case of prosecutions for fine or penalty under revenue laws, 466.
of clerks; compensation retained by, 467.
in California, Oregon and Nevada, 467.
of marshal, not to retain fees and emoluments exceeding $6000 a year, 467.
additional compensation in prize causes, 468.
allowance for personal compensation, 468.
payment of surplus into the treasury, 468.
auditing accounts of, 468.
must be certified by the district judge, 468.
the President may allow for extraordinary expenses of a ministerial officer, 469.
vouchers and items required, before allowance of bill of costs, payable out of the money of the United States, 469.
of commissioners, 470.
of witnesses, 471.
no officer of court entitled to, 472.

FEES—*continued.*
of clerks and other officers when sent away as witnesses, 472.
of seamen sent home as witnesses, 472.
of jurors, 473.
of printers, 473.
how paid and recovered, 474.

FORMS IN EQUITY,
bill to recover a legacy, 625.
bill to restrain infringement of copyrights, 627.
of patent-right, 630.
title established by previous suits, etc., 633.
bill for an injunction, 641.
bill for a discovery and to enjoin, 644.

FORMS FOR CIRCUIT COURTS,
order for subpœna, 647.
subpœna to appear and answer, 647.
form of appointment to serve a subpœna, 648.
precipe for appearance, 648.
order for appearance, 649.
motion for leave to file supplemental bill, 649.
answer, common form, 649.
order on exceptions, 650.
supplemental bill in a patent cause, 651.
second, 655.
amendment to a bill, 657.
general demurrer to bill, 658.
demurrer for want of equity, 659.
for multifariousness, 659.
on the ground of Statute of Frauds, 660.
certificate to, 660.
verification of, 660.
plea; certificate; verification, 660.
answer to bill, 662.
exceptions to answer, 663.
plea and answer, 663.
of former suit pending, 664.
replication, 666.
order of reference to master, 666.
to master to report, etc., 667.
to report account, etc., 668.
master's report, 669.
exceptions to report, 669.
order on attachment of person, 670.
order in case of contempt, 671.
order on conviction for contempt, 671.
order to refer second answer on old exceptions, 673.
order to refer when defendant does not submit to exceptions, 673.
order for further answer, 673.
interrogatories for examination of a party in contempt, 674.
order for commitment of defendant, 674.
order for marshal to arrest for contempt, 675.
order for sequestration, 676.
order for examination of defendant, 676.
order for attachment on third answer, 677.
order for temporary injunction, 677.
order allowing complainant to dismiss his bill, 678.
order to pay money into court, 678.
order directing plea to stand for answer, 678.
order of reference on plea of former suit in bar, 679.
order for cause to stand over to add new parties, 679.

FORMS FOR CIRCUIT COURTS—*continued.*
order for cause to stand over to supply proofs, 679.
master's report upon exceptions to answer, 680.
exceptions to master's report on exceptions, 680.
master's report on sufficiency of defendant's examination, 680.
commission to take testimony, 681.
commission of dedimus potestatum, 682.
affidavit for habeas corpus ad testificandum, 683.
abstract of pleading, 683.
agreement to submit cause on written argument, 684.
abstract of pleadings and points in issue, 684.
briefs and points on hearing, 685.
decree on staying infringement after verdict establishing a patent, 686.
decree of validity of patent, etc., 687.
decree of Supreme Court where it has no jurisdiction, 687.
decree of perpetual injunction upon printing, etc., 689.
decree of perpetual injunction upon making machine, etc., 689.
decree of perpetual injunction of use of trade-mark, 691.
order staying use of trade-mark, 691.
order for temporary injunction, 692.
final decree dismissing bill, 693.
decretal order, 693.
master's summons, 695.
master's report, 695.
exceptions to master's report, 695.
order for feigned issue, 696.
final decree, 697.
taxed costs, 698.
perpetual injunction, 699.
revised decree, 699.
enrolled decree, 700.
taxed costs to plaintiff; law, 701.
execution, 702.
taxed costs non pros, 703.
taxed costs, default, 704.

FORMS IN ADMIRALTY,
libel for salvage, 704.
stipulation for costs, 705.
attachment and monition in rem, 706.
claim by the agents of foreign underwriters, 707.
stipulation for costs by claimant, 710.
order of court on the return of mesne process, 711.
proclamation on return of process in rem, 712.
replication to claim and answer, 712.
claim by the United States attorney on behalf of the United States, 712.
libel for mariner's wages, 714.
libel in a cause for personal damage, 716.
libel in personam on contract, 718.
claim and answer, 719.
citation, with attachment of goods, 720.
citation, 721.
claim, 721.
claim; forfeiture, 722.
stipulation, 723.
stipulation in proceedings for forfeiture, 723.
stipulation by claimant in case of libel by United States, 725.
stipulation for restitution of attached property, 725.
attachment in personam, 726.
writ of appraisement, 727.
writ to restore, 728.

FORMS IN ADMIRALTY—*continued.*
return to writ to restore, 728.
order for process on libel, 729.
warrant of arrest and monition, 729.
bond by claimant, 730.
default and order of reference, 732.
report on reference, 732.
final decree, 733.
proctor's costs, 734.
clerk's costs; on default and reference, 735.
enrollment of decree, 736.
decree of condemnation, 737.
execution, 737.
direction by the clerk endorsed on execution, 738.
marshal's return, 739.
warrant of arrest in personam, 739.
marshal's citation, 740.
venditioni exponas, 740.
monition, 742.
marshal's notice, 742.
final decree pro confesso, 743.
clerk's bill of fees, 744.
information; seizure, 745.
information, another form, 747.
attachment on information, 748.
marshal's return to writ, 749.
marshal's notice, 749.
final decree pro confesso, 750.
clerk's costs, 751.
warrant to sell, 752.
information, another form; seizure, 753.
attachment in rem for forfeiture, 756.
taxed bill of costs, 757.
bills of taxed costs, 759.
marshal's bill, 760.
clerk's bill, 761.
United States district attorney's costs, 762.
certificate of license as counsellor, 762.
certificate to transcript of record, 763.

FORMS FOR REMOVAL OF CAUSES,
petition for removal in criminal cases, 764.
certiorari for removal of case from state court, 765.
petition for removal under section 2, act March 3, 1875, 766.
bond on removal, 767.
petition for removal from state court to circuit court under Revised Statutes, 767.
affidavit of prejudice or local influence under Revised Statutes, 769.
bond to accompany petition, 769.

FORMS, COMMISSIONERS',
order for appointment of commissioner, 785.
complaint, common form, 785.
for breaches of the peace, 786.
warrant to apprehend, 786.
return of marshal, 787.
subpœna, 787.
return by marshal, 787.
recognizance of prisoner pending examination, 788.
commitment pending examination, 789.
recognizance of witnesses, 790.

FORMS, COMMISSIONERS'—*continued.*
recognizance for appearance, 791.
mittimus, common form, 793.
affidavit of attendance, 793.
order to pay witness fees, 793.
transcript of docket, 793.
affidavit and order for examiner *de bene esse*, for plaintiff, 794.
notice of examination *de bene esse*, 795.
subpœna, 796.
caption for depositions *de bene esse*, 796.
certificate to depositions *de bene esse*, 797.
commission to take depositions, 798.
writ of habeas corpus, 799.
commission dedimus potestatum, 799.

FORMS FOR SUPREME COURT,
motion for leave to file a bill, 801.
bill for settlement of boundary between states, 801.
subpœna in a suit by one state against another, 804.
return of service of subpœna on a state, 805.
precipe for appearance by a solicitor, 805.
demurrer for want of jurisdiction, 805.
certificate to demurrer, 806.
affidavit to demurrer, 806.
motion to dismiss for want of jurisdiction, 806.
bill by one state against another to settle boundary, 807.
bill to restrain use of trade-mark, 808.
plea and certificate, 815.
answer, 815.
verification of answer, 818.
assignment of errors, 818.
joinder in error, 819.
precipe for appearance of defendant, 819.
receipt of record, 820.
bond for clerk's fees, 820.
writ of error to state court, 821.
to federal court, 822.
citation, 823.
bond on appeal, 823.
bond on certificate of division of opinion, 824.
judgment on writ of error to state court, 825.
to federal court, 826.
decree on appeal, 826.
mandate to state court, 826.
decree of Supreme Court where no point has been duly certified on division of opinion, 827.
judgment of Supreme Court on certificate of division, 828.
decree and order on default, 828.
mandate, 829.
decree annulling former decree, 830.
order and decree where the court has no jurisdiction, 830.
suggestion for prohibition, 831.
writ of prohibition, 833.
supersedeas from Supreme Court, 834.
writ of mandamus, 836.
injunction, 838.
certificate of division of opinion, 839.
certiorari, 841.
petition for habeas corpus, 843.
return to writ of habeas corpus, 844.
writ of habeas corpus ad testificandum, 844.

FORMS FOR COURT OF CLAIMS,
petition, general frame, 845.
petition in case transmitted from the head of a department, 846.
petition, fuller form, 846.
notice by the clerk to plaintiff, 851.
notice to the Attorney-General, 852.
plea of limitations, 852.
traverse, 852.
subpœna for witnesses, 853.
instructions for taking depositions, 853.
findings of fact, conclusions of law and judgment thereon, 858.
judgment for claimant, 873.
for defendants, 873.
order on motion for intervention, 874.
ruling upon motion for a new trial, 874.
judgment confirming report of referee and judgment thereon, 874.
certified transcript of pleadings, etc., 875.
attested judgment, 875.
certified judgment, 876.
application for appeal and order allowing same, 876.
another form, 877.

HABEAS CORPUS,
when federal courts may issue, 304.
provisions of the Revised Statutes, 305.
not issued of course, 307.
jurisdiction must be shown, 307.
allowance of, direction, return, 307.
proceedings governed by common law, 309.
court cannot inquire into facts, 309.
appeals to the circuit court, 311.
appeals from the circuit court to the Supreme Court, 311.
in cases involving the law of nations, 312.
appeals in case of, how taken, 313.

INDICTMENT. See *Criminal Cases.*
copy of to be delivered to defendant in certain cases, 417.
remitted by circuit and district courts, 418.
in difficult cases to circuit court, 418.
in other cases, 419.

INJUNCTION. See *Courts of the United States.*
when granted by the Supreme Court or its justices, 429.
temporary restraining orders, 429.
to stay proceedings of state courts, when granted, 430.

INSTANCE CAUSES. See *Admiralty; Pleading; Practice and Procedure.*
libels in, 83.
should show facts, 83.
should state ground of forfeiture, 83.

INTEREST. See *Procedure.*
on bonds given for duties, 518.
on balances due Post-Office Department, 518.
on debentures, 518.
on judgments, 518.

JUDICIARY DEPARTMENT,
of government, 2.
views of Mr. Story, 2.
extent of, 3.
constitutional provision, 3.
amendment of, 4.
Alexander Hamilton's views, note, 4.

JUDICIAL DISTRICTS,
provisions of statutes creating, 10, 19.
states constituting one, California, 10.
Colorado, 10.
Connecticut, 10.
Delaware, 10.
Indiana, 10.
Iowa, 10.
Kansas, 10.
Kentucky, 10.
Louisiana, 10.
Maine, 10.
Maryland, 10.
Massachusetts, 10.
Minnesota, 10.
Nebraska, 10.
Nevada, 10.
New Hampshire, 10.
New Jersey, 10.
Oregon, 10.
Rhode Island, 10.
Vermont, 10.
West Virginia, 10.
states constituting more than one, 11–19.
Alabama, 11.
Arkansas, 11.
Colorado, 11.
Florida, 11.
Georgia, 11.
Illinois, 12.
Iowa, 12.
Michigan, 12.
Mississippi, 14.
New York, 15.
North Carolina, 15.
Ohio, 15.
Pennsylvania, 16.
South Carolina, 17.
Tennessee, 17.
Texas, 18.
Virginia, 19.
Wisconsin, 19.
JUDGES,
appointment of, 10, 20.
district, in Iowa, 12.
in each district, 20.
in Colorado, 20.
in Texas, 20.
in Alabama, 21.
in Georgia, 21.
in Tennessee, 21.
of circuit, when to act as district judge in Tennessee, 46.
not to practice law, 25.
salary of district, 21, 22, 25.
after resignation in certain cases, 25.
district, in cases of disability, 51, 52.
in case they are interested in suits pending, 52.
in case of vacancy in the office, 52.
when applied to any circuit includes justices, 101.
of circuit courts, salary of, 102.
in New York, 103.

JUDGES—*continued.*
may set apart in circuit courts, 103.
of circuit and district courts of New York, or either of them, in criminal cases, 103.
of district courts may sit to review his own opinion, in the circuit court, 104.
of circuit courts when interested in suit pending, 104.
of circuit and district courts, must concur in the appointment of clerks, 105.
oath of office, 426.
prohibited from practicing law, 427.
resigning entitled to salary in certain cases, 427.
of Supreme Court may issue writs of ne exeat, 428.
of United States courts may make arrests for offences against the United States, 436.
hold to security of the peace, 436.
enforce awards of consuls, 436.
JUDGMENTS. See *Circuit Court; District Court; Court of Claims.*
of circuit courts, liens of, 183.
of district courts, how reviewed, 98.
of Court of Claims, 328, 329, 376.
how paid, 322, 378.
appeal from, 291.
remedies upon, in a foreign state, 499.
for divorce in a foreign state, 499.
where invalidity of, appears from the record, 499.
in suits under postal laws, 516.
on debentures, 517.
on bonds for duties, 517.
in equity, 517.
for duties, etc., 517.
interest on, 518.
liens of, how limited, 518.
JURISDICTION OF SUPREME COURT. See *Supreme Court.*
power vested in, 3.
extent of power, 3.
in what cases it has original jurisdiction, 7.
in what cases it has appellate jurisdiction, 7.
original jurisdiction not exclusive, 7.
at law and in equity, 227–238.
when a state is a party, 230.
on whom service of process should be made, 228.
suit by a state against a corporation, 230.
when process must be served, 228.
frame of bills in equity, 231.
essentials of a bill, 229.
leave to file a bill, 232.
demurrer for want of jurisdiction, 234.
certificate of counsel and affidavits of defendant required to a demurrer or plea, 235.
JURISDICTION OF CIRCUIT COURTS. See *Circuit Courts.*
original and appellate, 108–174.
suits of a civil nature at common law or in equity, 109.
injunctions to state courts, when prohibited, 111.
value of the matter in dispute, 111.
suits arising under the Constitution or laws of the United States, 113.
controversy arising between citizens of different states, 114.
who are citizens, 115.
parties merely nominal or formal, 116.
proper citizenship of the parties should appear in the record, 117.
nominal and formal parties, 118.

JURISDICTION OF CIRCUIT COURTS—*continued.*
evidences of citizenship, 118.
slaves of African descent not citizens, 118.
citizenship of executors and administrators, 118.
parties having only equitable interests, 119.
in equity, when citizenship not important, 119.
when parties may be dismissed, 121.
corporations are citizens, 121.
burden of proof of citizenship of corporations, 122.
when the United States are plaintiffs, 122.
when citizens of the same state claim lands under grants of different states, 123.
controversy between citizens of a state and foreign states, citizens or subjects, 123.
exclusive cognizance of certain crimes, 124.
where the punishment is death, 126.
capital cases remitted from the district to the circuit courts, 127.
offences on the high seas, where triable, 127.
in other cases, where triable, 128.
where a civil suit must be brought, 128.
attachment of property will not confer jurisdiction, 128.
where service of process may be made by publication, 129.
where all the defendants cannot be served, 130.
when a proper party may be omitted, 131.
formal parties may be dispensed with, 132.
suits on contract in favor of an assignee, 132.
suits by endorsees, 135.
corporations citizens, 135.
when corporate bonds and coupons not subject to the statute relating to promissory notes or bills of exchange, 135.
where a corporate bond is payable to bearer, 136.
facts showing jurisdiction must be averred, 136.
implied and resulting powers of, 138.
when a statute is a substitute for a former one, 138.
suits under import, revenue and postal laws, for the enforcement of penalties and condemnation of property, 139.
suits for the enforcement of liens or the removal of incumbrances, 139.
suits for seizure under the slave-trade laws, 140.
suits arising under the patent and copyright laws, 140.
suits by and against national banks, 142.
suits by receivers of national banks, 143.
suits to redress the deprivation of rights, 144.
appellate, 144.
decree must be final, 145.
cause must be of equity or admiralty jurisdiction, 145.
when appeal will be dismissed, 145.
on error to judgments of district courts, 145.
in cases transferred from district courts, 146.
court always open for certain business, 146.
on removal of causes from state courts, 147.
two classes of causes may be removed, 148.
all suits of a civil nature, 148.
suits arising under the Constitution or laws or treaties of the United States, 149.
either party may remove when the controversy is between citizens of different states, 150.
when one party is an alien, 153.
manner of removal, 153.
when the petition for removal must be filed, 154.
the statute must be substantially complied with, 155.
sufficiency of the bond given on removal, 155.

JURISDICTION OF CIRCUIT COURTS—*continued.*
on removal of causes, state court may pass upon the sufficiency of the application for, 156.
personal citizenship of the parties required, 157.
when the controversy is wholly between citizens of different states, 157.
on account of prejudice or local influence, 157.
application must be made to state court of original jurisdiction, 158.
in case of suits against corporations, 158.
in case of persons denied any civil right, 160.
when the petitioner is in actual custody under process of a state court, in such a case, 161.
in case of suits or prosecutions against revenue and other federal officers, 162.
in case of suits to determine the right to an office in certain cases, 164.
process of attachment, injunction, etc., not affected by, 165.
when suit may be dismissed or remanded, 166.
when a copy of the record should be filed, 168.
refusal of clerk to furnish record, 168.
when writ of certiorari will issue to compel clerk, 168.
when issues of fact tried by jury, when by the court, 169.
may certify a division of opinion to Supreme Court, 170.
point of division must be stated, 171.
question must relate to a point of law and not of fact, 171.
where point certified is one of practice or discretion, 171.
writs of error in criminal cases to district courts, 172.
return of proceedings thereon, 173.
of Court of Claims, 330–350.
under revenue laws, 339.
of claims founded upon acts of Congress, 341.
founded upon a regulation of an executive department, 341.
upon an express contract, 341, 342.
implied contract, 343.
in case of claims referred to it by Congress, 344.
by disbursing officer, 346.
for proceeds of captured property, etc., 346.
for property destroyed by the army or navy, 346.
in Congress, 350.
of courts, of the person, note, 498.
presumptions of, from recital in the record, note, 498.
voluntary, general appearance confers, 499.
in case of foreign attachment, 499.
of federal courts, when exclusive, 425.
of district courts, 54–69.
special and limited, 54.
crimes and offences, 54.
of piracy, 55.
of prosecutions for penalties and forfeitures, 55.
of suits by the United States to enforce revenue taxes, 56.
of admiralty and prize causes, 56, 57.
of suits for maritime liens, 58.
of suits by material-men, 59.
of suits on bottomry bonds, 61, 62.
of suits for salvage, 62.
of suits for possession of ship, etc., 63.
of suits for mariners' wages, 64.
of suits for pilot's wages, 65.
of suits for torts, 66.
of suits for collisions, 67.
of suits by libel against vessel and master, 68.
of suits for assault and battery, 68.
of suits for injury to passengers, 69.

JURIES,
qualification of jurors, note, 449.
pay of jurors, 449.
challenges, note, 449.
mode of drawing, 449, 450.
how jurors apportioned, 450.
talesmen for petit, 450.
special, in circuit courts, 451.
in northern New York, 451.
petit, in Vermont, 451.
number of grand jurors, 451.
federal courts may determine the number to be summoned, note, 451.
foreman, appointment and powers of, 452.
grand, when summoned, 452.
when discharged, 452.
jurors not to be summoned oftener than once in two years, 452.
grand jurors may take cognizance of offences within the jurisdiction of circuit court as well as district court, 452.
jurors in western district of Arkansas, 453.
in Kentucky and Indiana, 453.
at special terms in North Carolina, 453.
for western district of South Carolina, 453.
charge of grand juries in Vermont, 453.
grand and petit, in Colorado, 453.
in Georgia, 454.
in northern district of Ohio, 454.
in eastern district of Tennessee, 454.
challenges of petit jurors, 454.
persons excluded in certain cases, 455.

JURORS. See *Juries.*
compensation of, 449.
how drawn, 449, 450.
how apportioned in districts, 450.
talesmen for petit juries, 450.
grand, number of, 451.
foreman of, 452.
when summoned, 452.
discharge of, 452.
not to be summoned oftener than once in two years, 452.
grand, may act in cases cognizable either in circuit court or district court, 452.
in western district of Arkansas, 453.
in Kentucky and Indiana, 453.
in western district of South Carolina, 453.
in Vermont, 453.
in Colorado, 453.
in Georgia, 454.
in Ohio, 454.
challenges to, how many, 454.
in certain cases, not qualified, 455.
fees of, per day, 473.
mileage going and returning, 473.
qualification and mode of selection, 448.
not disqualified on account of color, 448.

JUSTICES. See *Circuit Courts.*
allotted to circuits, how understood, 101.
Chief Justice and associate justices of Supreme Court allotted among the circuits, 101.
of Supreme Court to attend the circuit court in each district once in two years, 103.

LIBEL. See *Admiralty; Pleading; Practice and Procedure.*
what it must contain, 70.
must be filed before process can issue, 70.
where several claims for damages are united in one libel, 71.
for assault and battery, 71.
against a ship and her tackle, etc., 72.
or information on seizures, what it must state, 78.
in instance causes, 83.
amendments of, 83.
for embezzlement, 93.

LIENS. See *Judgments.*
of shippers, 59.
of material-men, 59, 60.
for supplies, 60, 61.
under bottomry bonds, 61, 62.
for salvage, 62.
for mariners' wages, 64, 65.
for pilot's wages, 65.
when judgments cease to be, 518.

LIMITATIONS,
Statute of, how applied to judgments, note, 497.
statutes on, 526–528.
in case of capital offences, 526.
in case of offences not capital, 526.
in case of fleeing from justice, 527.
in case arising under revenue laws, 527.
in case of penalties and forfeitures, 527.
during the rebellion, 528.

MANDAMUS,
writ of, an ancient common law writ, 298.
instituted to prevent a failure of justice, 298.
general principles applicable to federal courts, 298.
provisions of the Revised Statutes relating to, 298.
functions of the writ, 299.
to compel the performance of duties by an inferior court or an officer, 299.
not to control a judgment or discretion, 299.
may compel a judgment or action, where a judgment or action is a plain duty, 299.
cannot command a particular judgment or interfere with a legal discretion, 300.
when it may properly issue, 300.
may be issued by the Supreme Court and by circuit and district courts, when necessary for the exercise of their respective jurisdictions, 301.
practice and procedure, 302, 303.
when the writ will not issue, 302.

MARITIME LIENS,
jurisdiction of district court, 58.
in suits on contracts generally, 59.
for shipper's liens, 59.
by material-men, 57, 59, 60.
on bottomry bonds, 61, 62.
for salvage, 62.
in petitory actions, 63.
for mariners' wages, 57, 64.
for pilot's wages, 65.
for maritime torts, 66.
for collisions, 67.
by libel, 68.
for assault and battery, 68.
for injury to passengers, 69.

MARSHAL,
or deputy cannot act as attorney, etc., in any United States court, 447.
penalty for so doing, 447.
to make semi-annual return of fees and emoluments to the Attorney-General, 465.
what to be included in the return, 465.
fees of in Oregon and Nevada, 466.
limit of allowance by Attorney-General, 467.
additional compensation in prize causes, 468.
accounts of to be carefully examined, 468.
certified by the district judge, 468.
rendered with vouchers and items, 469.
and fees of, how paid, 474.
in case of death of after levy, 524.

MARSHALS AND DEPUTY MARSHALS,
how appointed, 28.
deputy, how appointed, 28.
official oaths, 28.
fees and salary, 28.
bond, 29.
suits on bonds of, 29.
bond to remain after judgment on, 29.
limitation of action on, 29.
duties and powers of, 30.
duty of deputy in case of death of, 30.

MASTERS IN CHANCERY,
circuit court may appoint standing masters in chancery, 215.
both judges must concur in the appointment of, 215.
pro hac vice, may be appointed in any particular case, 216.
no clerk of the district or circuit court or his deputy can be appointed, except in certain cases, 216.
compensation of, fixed by the court in each case, 216.
reference to, if the bill calls for an account when complex and intricate, 216.
only made after interlocutory decree, 216.
may take evidence on written interrogatories or viva voce, 216.
should give due notice to the respective parties of the hearing on the reference, 216.
when parties fail to appear may proceed ex parte, 216.
must proceed with the hearing without unreasonable delay, 216.
exceptions to report may be made by either party, 216.
what the exceptions should point out, 217.
hearing before the master, 217.
may examine all the parties on the hearing, 217.
witnesses, how procured, 217, 218.
how accounts must be brought in, 218.
may examine creditors or other persons upon written interrogatories or viva voce, 218.
exceptions to master's report, when filed, 218.
not in the nature of special demurrer, 219.
costs on, how regulated, 219.

MONEY,
paid into court, 524.
deposited, how withdrawn, 525.

NEW TRIAL,
when United States courts may grant, 436.

OATH. See *Rules.*
to libels, 705.
to answer, 582.
to claim, 582.

ORIGINAL JURISDICTION,
of Supreme Court, 7.
not exclusive, 8.
of inferior courts, 8.

OFFENCES. See *Crimes; Criminal Cases.*
on the high seas, where triable, 439.
begun in one district and completed in another, where triable, 439.

PENALTIES AND FORFEITURES. See *District Courts.*
where suit for may be brought, 439.

PETITION. See *Court of Claims.*
in Court of Claims, what to contain, 325, 359.
when to be dismissed, 325.

PLEA. See *Practice and Procedure in Equity.*
bills may be amended after, on the order of the court, 197.
cannot be filed without the certificate of counsel, 198.
may be filed to whole or part of bill, 198.
office of, 199.
argument on, 199.
costs, when overruled, 200.
amendment of bill when plea is sustained, 200.
to part of bill and answer balance, 200.

PRACTICE AND PROCEDURE IN SUITS AT LAW. See *Circuit Courts; Jurisdiction of Circuit Courts; Supreme Court.*
practice and procedure in other than equity causes, 175.
summons or other original process, 175.
service in accordance with state law, 175.
must run in the name of the President of the United States, 175.
must be served by marshal or his deputy, except when he is a party, 176.
subpœnas may be served by any person in conformity to state laws, 176.
jurisdiction over non-resident, cannot be acquired by attachment, 177.
service of process may be waived, 177.
circuit and district courts may make rules in certain cases, 178.
pleading, practice and procedure to conform to those of state courts of record, 178.
intervention, reference, bail, imprisonment, 180.
attachments, remedy by, 181.
original process cannot be served beyond the limits of the district where issued, 181.
the levy of an attachment within the district will not give jurisdiction, 181.

PRACTICE AND PROCEDURE IN EQUITY. See *Circuit Courts; Jurisdiction of Circuit Courts; Supreme Court.*
mesne process and proceedings in equity, 184.
rules prescribed by the Supreme Court, 184.
power of Supreme Court to regulate, 185.
when affirmation may be taken in lieu of an oath, 186.
effect of orders made in vacation, 187.
entry of orders and motions, 187.
rule days, 187.
motions for process of course, 188.
motions not grantable of course, 188.
subpœna and attachment, proper mesne process, 189.
jurisdiction over person can only be acquired by proper service of subpœna within the district, 189.
proceedings in rem, authorized in certain cases, 189.
when process of subpœna returnable, 190.
mode of service of subpœna, 190.
alias subpœnas, 190.
who may serve, 190.

PRACTICE AND PROCEDURE IN EQUITY—*continued.*
docketing cause, 191.
appearance day, 191.
bills taken pro confesso, 192.
when defaults may be entered, 192.
decree on default, 192.
frame of bills, 193.
introductory part, 193.
what may be omitted from a bill, 193.
what the prayer for relief must contain, 194.
where parties are beyond the jurisdiction of the court, 194.
what the prayer for process must contain, 195.
signature of counsel to bills, 195.
scandal and impertinence in bills, 195.
order of reference for scandal and impertinence in bills, 196.
amendments of bills, when of course, 196.
after answer, plea or demurrer, 197.
when amendments must be filed after order of allowance, 198.
demurrers to pleas, 198.
demurrer, plea, answer, 198.
argument on demurrer or plea, 199.
costs where demurrer or plea is overruled, 200.
amendment of bill after allowance of demurrer-costs, 200.
effect of failure to reply to plea or set down plea or demurrer for argument, 200.
effect of answer as evidence, 201.
interrogatory part of bill, answer to, 202.
when the answer is not evidence, 202.
note at foot of bill part of it, 202.
interrogatories a defendant may decline to answer, 203.
replication to answer, 203.
parties to bills, absent parties, 204.
when parties are numerous, 206.
where trustees, executors or administrators are parties, 206.
where an heir-at-law is not a necessary party, 207.
where there are joint and several debtors, 207.
where defect of parties may be shown by plea or answer, 207.
nominal parties need not appear, 208.
injunctions, when granted of course, 208.
bills of revivor and supplemental bills, 209.
when supplemental bills are proper, 210.
answers and amendments thereof, 210.
exceptions thereto, 211.
when exceptions will be set down for a hearing, 211.
answer after exceptions thereto sustained, 211.
replication and issue, 212.
depositions, commissions and commissioners, 213.
three months allowed after cause at issue to take testimony, 214.
testimony *de bene esse*, 214.
notice, form of last interrogatory, 214.
defendant must answer original bill before he is required to answer cross-bill, 215.
appointment of masters and their compensation, 215.
reference to master, 216.
hearing before a master, evidence, 217.
witnesses, how procured, 217.
how accounts must be brought in, 218.
examination of a party, 218.
exceptions to the report of master, 218.
when master must return report, 218.
costs on exceptions, 219.

PRACTICE AND PROCEDURE IN EQUITY—*continued.*
decrees, mistakes in may be corrected, 219.
practice in this country, 219.
appointment of guardians, etc., 220.
rehearing, what the petition for should contain, 220.
rules made by circuit courts, 221.
decrees in case of foreclosure, 221.

PRACTICE IN SUPREME COURT. See *Supreme Court.*
rules of practice, 227.
writs and process under seal of court, 227.
signed by clerk, 227.
bear teste of Chief Justice, 227.
or when that office is vacant, of the associate justice next in precedence, 227.
must bear from the day of issue, 227.
courts of King's Bench and of Chancery in England afford outlines for, 227.
just analogies, 227.
all process must be in the name of the President, 228.
against a state must be served on the governor or chief magistrate and attorney-general, 228.
of subpœna must be served sixty days before the return day, 228.
if defendant does not appear on return day plaintiff may proceed ex parte, 228.
where forms of English courts are not applicable, 228.
procedure in equity, 229.
essentials of a bill in equity, 229.
prayer for process of subpœna, 229.
bills must contain signature of counsel, 229.
when a state is a necessary party, 230.
frame of bills in equity, 231.
what the interrogatory part should contain, 231.
form of conclusion of bill, 231.
leave to file a bill, 232.
practice in respect to, 232.
proceedings where the defendant fails to appear, 232.
proceedings where defendant appears, 233.
when the bill will be dismissed on motion, 233.
demurrer for want of jurisdiction, 234.
certificate of counsel to plea or demurrer, 235.
office of a plea, 236.
setting down a plea or demurrer for a hearing, 237.
when averment of the bill will be taken as true on argument of plea, 237.
costs on plea or demurrer overruled, 238.
costs on plea or demurrer allowed, 238.

PRACTICE AND PROCEDURE ON WRIT OF ERROR OR APPEAL. See *Writ of Error and Appeal.*
appellate jurisdiction of Supreme Court, 239.
what may be reviewed on, 239.
final judgments only, 239.
all parties interested must join in, 340.
proceeding where some refused to join, 340.
the proper parties must appear on the record, 341.
amount in controversy, 341.
value of, a jurisdictional fact, 242.
where the matter is not susceptible of valuation, 243.
where the value does not appear on the record, 244.
stated in the pleading is conclusive, 245.
appeals in equity and admiralty causes, 246.
final decrees in, 246.
where they are not final, 247–251.

PRACTICE AND PROCEDURE ON WRIT OF ERROR OR APPEAL—*continued.*
appeals, time limited, 251.
jurisdiction apparent of record, 251.
right of appellant to dismiss, 252.
when dismissed of course, 252.
appeals cannot be taken in name of steamboat, 257.
appeals without reference to amount, when allowed, 257.
cases tried without a jury, 259.
general and special finding of facts, 259.
writ of error upon an agreed case, 260.
writs of error and appeals from other courts, 261.
appeals from the Court of Claims, 262.
judgments of state courts, 262.
writs of error to state courts, 264.
a proper question must be presented, 265.
a specific question must be presented, 265.
the United States have a right to writ, 267.
highest court of state, meaning of, 267.
what the record must contain, 268.
jurisdiction not conferred by consent, 268.
constitutionality of state laws, 269.
application of the statute, 269.
review on error in criminal cases, 270.
transcript and other papers, 270.
rules relating to transcript and papers, 273.
writs of error, when returnable, 273.
bond for costs, 273.
appearance of counsel, 274.
filing transcript and docketing cause, 274.
duty of clerk to have record printed, 276.
motion day—argument of motions, 267.
motions to dismiss, 276.
and affirm, 277.
mode of service of notice of motion, 277.
proof of service, 277.
procedure in case of diminution of record, 278.
where either party dockets the cause, 278.
where a state is a party, 279.
on submission of cause on written argument, 280.
on call of the docket, 281.
in criminal cases, 281.
on the argument, preparation of the same, 281.
what the brief must contain, 282.
judgment on review, 284.
where there are errors apparent of record, 284.
for interest and damages, 285.
for a trial de novo, when, 286.
allowing parties to amend, 286.

PRINTERS,
fees of, 473.
meaning of term folio, 473.

PRIZE. See *Admiralty; Pleading; Practice and Procedure.*
causes, 79.
district and circuit courts have cognizance of, 79.
may decree restitution, 80.
where property may be seized, 80.
process in case of seizure, 80.
condemnation of property employed in aid of insurrection, 81.
property, real and personal, 81.

PROCEDURE,
sealing and testing of writs, statute, 504.
mesne process and proceedings in equity, 504.
in other than equity and admiralty causes, 504.
on attachments, 505.
on execution, 505.
power of Supreme Court to regulate, 505.
may be regulated by rules of the courts, 505.
in suits for duties, imports, taxes, etc., 506.
in case of seizure under revenue laws, 506.
consolidation in cases under revenue laws, 506.
orders of courts to save costs, 506.
when the marshal or his deputy is a party, 506.
on attachment in postal suits, 507.
in case of application for warrant of attachment in certain cases, 507.
warrant, duty of clerk, etc., on issuing, 508.
ownership of attached property, 508.
attached property, when sold and proceeds invested, 508.
publication in case of, 509.
discharge of, 509.
property, under revenue laws, irrepleviable, 509.
attachments dissolved in accordance with state law, 509.
garnishees in suits by United States on notes, 510.
when indebtedness is denied, 510.
failing to appear, 510.
bailing of property seized under customs, 510.
on property after condemnation, 511.
in case of seizure, bailing in vacation, 512.
bailing in admiralty cases, 512.
special bail in certain cases for duties and penalties, 512.
where defendant has given bail in another district, 513.
bail and affidavits taken by commissioners, 513.
when a bail bond is given in Kentucky, 513.
clerks may take bail *de bene esse*, 514.
amendment of process, 514.
priority of state on the docket in certain cases, 514.
notice of case for trial, 514.
in suits by the United States, what credits allowed defendant, 514.
in case of bill of exceptions, 515.
defects of form, 515.
death of parties, 515.
death of one of several parties, 516.
suits by the United States against delinquents, 516.
judgment in suits under postal laws, 516.
on debentures, 517.
on bond for duties, 517.
interest allowed on bonds for duties, 518.
on balances due Post-Office Department, 518.
on debentures, 518.
on judgments, 518.
when judgments cease to be liens, 518.
when no costs recoverable unless judgment exceeds $500, 518.
costs in internal revenue cases, 519.
double costs, when allowed, 519.
costs in suits under copyright laws, 519.
for infringement of patent, 519.
cost of prosecution, when defendant subject to, 520.
may recover, 520.
fees of clerk, etc., by whom payable, 520.
costs in libels against vessels and cargoes, 520.
in case of recovery by claimant, 521.

PROCEDURE—*continued.*
costs of district attorney, 521.
of witnesses before commissioner, 521.
when attorney, etc., liable for, 521.
how taxed, 521.
bill of sworn to, 522.
executions run into all districts of the state, 522.
in favor of United States run into every state, 522.
stay of, 522.
against revenue officers, 523.
when imprisonment on restrained, 523.
privileges of jail limits, 523.
goods taken on, how appraised, 524.
in case of death of a marshal, 524.
money paid into court, 524.

PROCESS. See *Supreme Court; Practice; Attachment; Admiralty Pleading, Practice and Procedure.*
of arrest and attachment, 73.
of garnishment, 73.
of attachment, when dissolved, 73.
of execution may issue, when, 74.
when warrant of arrest cannot issue, 74.
in case of seizure, 80.
of foreign attachment, when libellant may have, 88.
imprisonment for debt, 91.
attached property, money arising from, 508.
publication of notice thereof, 508.
discharge of, bond, 509.
dissolution under state laws, 509.
under revenue laws, 509.
in admiralty, warrant of arrest, 577.
in case of seizure, 577.
attachment against garnishees, 583.
of proceeds of property, 583.
on sale, 586.

PROHIBITION. See *Writs of Prohibition; Forms for Supreme Court.*

REMOVAL OF CAUSES. See *Jurisdiction of Circuit Courts.*
from state to circuit courts, 147–169.
two classes of causes may be removed, 148.
the cause must be of a civil nature, 148.
suits arising under the Constitution or laws or treaties of the United States, 149.
what the petition for removal should show, 149.
either party may remove where the controversy is between citizens of different states, 150.
where the controversy is between citizens of one or more states on one side, and citizens of other states on the other, either party may remove it, 150.
all of the parties on one side of the controversy must be citizens of different states from those on the other side, 152.
where one party is an alien, 153.
manner of removal, 153.
a petition for removal must be filed in the state court, 153.
when the petition must be filed, 153, 154.
a bond must be filed with the petition, 153, 155.
the statute must be substantially complied with, 155.
a bond with a blank where the penalty should have been inserted is not a good bond, 155.
the state court may pass upon the sufficiency of the application, 156.
if the application is sufficient, the state court should order a removal, 156.

REMOVAL OF CAUSES—*continued.*
personal citizenship of the parties required, 157.
when the controversy is wholly between citizens of different states, 157.
a fragment of a cause cannot be removed, 157.
removal on the ground of prejudice or local influence, 157.
application must be made to a state court of original jurisdiction, 158.
in case of suits against corporations organized under laws of the United States, 158.
civil or criminal, against persons denied any civil right, 160.
when the petitioner in such a case is in actual custody under process of a state court, 161.
removal of suits and prosecutions against revenue and other federal officers, 162.
to determine the right to an office in certain cases, 164.
process of attachment, injunction, etc., not affected by removal, 165.
after removal, when suit may be dismissed or remanded, 166.
when a copy of the record should be filed in the circuit court, 168.
in case of refusal of clerk to return the record, may be compelled by certiorari, 168.

REPLICATION. See *Practice and Procedure in Suits at Law; Practice and Procedure in Equity.*
amendments of, may be made by leave of court after answer, but before replication, 197.
admits the sufficiency of a plea, 201.
no special replication to answer allowed, 203.
replication to answer must be filed on or before the rule day next succeeding the filing of the same, or if excepted, next succeeding that on which it shall be adjudged sufficient, 212.
effect of a failure to reply in time, 212.

REVENUE,
suits for, when brought, 439.

RULES OF DECISION. See *Courts of United States.*
of courts of the United States, laws of the several states, 430, 431.
construction of state laws, 431.

RULES,
general, of the Supreme Court, 529.
relating to the clerk, 529.
attorneys, 529.
practice at law, 530.
bills of exceptions, 530.
process, 530.
motions, 530.
law library, 531.
writs of error, 532.
docketing cases, 533.
security for costs, 534.
printing of records, 534.
attachment for costs, 535.
translation of records, 535.
evidence, 535.
objections to evidence, 535.
certiorari, 536.
death of a party, 536.
non-appearance of plaintiff, 538.
of defendant, 538.
of either party, 538.
printing arguments, etc., 538.
general, of Supreme Court, 539–545.

RULES—*continued.*
limiting counsel, etc., 539.
providing for order of argument, 540.
relating to costs, 540.
opinions, 542.
call of docket, 542.
adjournments, 543.
dismissal in vacation, 543.
supersedeas bonds, 544.
suspension, etc., of injunctions, 544.

RULES OF COURT OF CLAIMS, 593–610.

RULES IN EQUITY, 546–566.
requiring courts always open for certain purposes, 546.
clerk's office open on the first Monday of each month, 546.
relating to motions and orders, 547.
motions for process, 547.
motions not grantable of course, 547.
compulsory process, 548.
final process, 548.
writ of assistance, 549.
parties, 549.
subpœna and service, 549.
alias subpœnas, 550.
day of appearance, 550.
default, 550.
decree on default, 551.
bills—form of introductory part, 551.
what may be omitted, 552.
parties without the jurisdiction, 552.
prayer for process, 552.
signature of counsel, 553.
costs, 553.
surplusage of bill, 553.
exceptions to bill, 553.
amendments of, 554.
order of court on, 555.
certificate and affidavit required to demurrer and plea, 555.
argument on plea, 555.
costs on demurrer, 556.
sufficiency of demurrer and plea, 556.
practice on plea or demurrer, 556.
answer to bill, 557.
interrogatories of bill, 557.
answer as evidence, 558.
form of interrogatories, 558.
special replication, 559.
supplemental answer, 559.
parties, 559.
when numerous, 560.
trustees as parties, 560.
heirs-at-law as parties, 560.

RULES IN ADMIRALTY,
when warrant of arrest may issue, 577.
when ship, etc., ordered into custody, 577.
in case of seizure, warrant of arrest, 577.
of perishable goods, 577.
of application of claimant, 578.
of suits by material-men, 578.
of suits for mariners' wages, 578.

RULES IN ADMIRALTY—*continued.*
of suits for pilotage, 579.
of suits for collision, 579.
of suits for assault and beating, 579.
of suits on bottomry bonds, 579.
of suits for salvage, 579.
of suits for possession, 580.
of decrees, 580.
of informations or libels on seizures, 580.
of libels, etc., in instance causes, 581.
amendments of, 581.
security for costs is required, 581.
when a claim must be verified, 582.
answer must be, 582.
in relation, exception to answer, 582.
in relation to defaults, 582.
requiring further answer, 583.
relieving defendant from answer in certain cases, 583.
requiring answer to interrogatories, 584.
verification of, on oath, 584.
in case of intervention, 584.
of stipulation for costs, 584.
of allowance of exceptions, 584.
of attachment against garnishees, 585.
of attachment of proceeds of property, 585.
of non-appearance of libellant, 585.
of default, decree rescinded, when, 585.
of sale of property, 586.
of money paid into registry, 586.
of intervention for proceeds, 586.
in reference to commissioners, 586.
to appeals, 587.
to practice, 587.
to bail, 587.
to imprisonment for debt, 587.
to answers, 587.
to further proof on appeal, 588.
to oral evidence on appeal, 588.
to new facts in answer, 588.
to records on appeal, 589.
to cross-bill, security for costs, 590.
to libel for embezzlement, 590.
to proof of claims before commissioner, 591.
to who may defend in embezzlement suits, 592.
to filing of libel in such cases, 592.

SECURITY OF THE PEACE. See *Commissioners of Circuit Courts.*
judges and commissioners may hold to, 436.

SEIZURE. See *Admiralty; Pleading; Practice and Procedure.*
in prize cases, 79.
where must be made, 80.
condemnation of property under, 81.
of property, both real and personal, 81.
cognizable in district court of the district into which the property is first taken, 82.
for forfeiture, where prosecuted, 439.
for condemnation of property used for insurrectionary purposes, 439.

STATUTES. See *Evidence; Limitations.*
provisions of common to more than one court or judge, 425.

SUITS. See *Suits at Law; Suits in Equity.*
for penalties and forfeitures, where brought, 439.
for condemnation in certain cases, 439.
to enjoin the Comptroller of the Currency, 440.
where one or more of the defendants are not inhabitants of the district, 440.
against absent defendants, practice, 441.
must generally be brought in district where the defendant resides or is found, 443.
not of a local nature, practice, 445.
where there is more than one district in the same state, 445.
relating to land, etc., partly in one district and partly in another, 446.
in Indiana, 446.
in Iowa, 446.
in Kentucky, 446.
may be managed by the parties personally, 447.
clerks cannot act as attorneys in, 447.

SUPREME COURT. See *Jurisdiction.*
jurisdiction of, 7.
limited, 7.
not exclusive, 7.
organization and sessions of, 222–226.
constitution of, 222.
precedence of the justices of, 222.
vacancy in office of Chief Justice, 222.
salary of justices, 222.
appointment of a clerk, marshal and reporter of the same, 222.
appointment of a deputy clerk, 222.
duty of the marshal, 223.
salary of the marshal, 223.
appointment of assistants and messengers, 223.
duty of the reporter, 223.
salary of the reporter and price of reports, 223.
tenure of office of the justices, 224.
terms of the Supreme Court, 226.
original jurisdiction of at law and in equity, 227–238.
rules of practice of, 227.
procedure in equity, essentials of a bill, 229.
when the state is a necessary party it must appear from the bill that it is so in fact, 230.
where the suit is by a state against a corporation, it should be shown by the bill that it was constituted such under the laws of some other state, 230.
frame of bills, interrogatories, 231.
leave to file a bill, practice, 232.
the clerk will issue a subpœna, 232.
practice where a state fails to appear after due service of subpœna, 232.
may prescribe rules of practice and procedure for itself, 232.
proceedings on the part of the defendant, 233.
when a bill will be dismissed on motion, 233.
demurrer to bill for want of jurisdiction, 234.
certificate of counsel required to demurrer or plea, 235.
affidavit of defendant to demurrer or plea, 236.
setting down demurrer or plea for a hearing, 237.
costs on overruling a plea or demurrer, 238.
amendment allowed after plea or demurrer to a bill is sustained, 238.

SUPERSEDEAS. See *Courts of the United States; Jurisdiction.*
when issued, note, 428.

TORTS. See *District Courts; Jurisdiction.*
jurisdiction of in case of, dependent on locality, 57.

TORTS—*continued.*
in case of, extended, 66.
in case of, not limited to the ebb and flow of tides, 67.
in case of collisions, 67.
in case of may be in rem or in personam, 68.
in case of assault and battery, 68.
in case of injury to passengers, 69.
Court of Claims no jurisdiction in, 336.

VERDICT. See *Criminal Cases.*
against part of several defendants, 418.

WARRANT. See *Process; Writs.*
in admiralty, when may issue for arrest, 577.
in case of seizure, 577.

WITNESSES. See *Evidence.*
fees of, 471.
detained in prison for want of security for his appearance, 471.
no officer of court to have witness fees, 472.
clerk or other officer, when witness for the government, expenses allowed, 472.
seamen sent home as, compensation of, 472.
fees of, before a commissioner, limited, 521.

WRITS. See *Courts of the United States.*
of ne exeat, 428.
certiorari, note, 428.
supersedeas, note, 428.
injunction, 429, 430.
in other cases, note, 429.

WRIT OF MANDAMUS. See *Mandamus.*

WRIT OF PROHIBITION,
may be issued by the Supreme Court to district courts, 293.
ancient common law writ, 293.
ground for proceeding by, 293.
practice in the Supreme Court, 293.
issuance of, limited to the district courts when proceeding as courts of admiralty and maritime jurisdiction, 294.
will issue only in cases expressly provided for by statute, 295.
where it will not issue, 296.
application for, may be by petition or by motion supported by affidavit, 297.

WRIT OF ERROR AND APPEAL,
appellate jurisdiction of the Supreme Court, 239–292.
from final judgments, 239.
all parties interested must join in, 240.
practice where a party refuses to join, 240.
there must be proper parties on the record, 241.
amount in dispute must exceed $5000, 241.
no appellate jurisdiction where the matter in dispute is not susceptible of valuation, 243.
value of matter in dispute a jurisdictional fact, 244.
consent cannot confer jurisdiction, 244.
where the amount in dispute does not appear, 244.
when the value stated in the pleadings is conclusive, 245.
appeals in equity and admiralty cases, 246.
decrees must be final, 246.
what decrees are not final, 247.
decisions relating to decrees, 248.
time within which appeal must be taken or writ of error prosecuted, 251.
where want of jurisdiction is apparent, 251.

WRIT OF ERROR AND APPEAL—*continued.*
when an appeal will be dismissed, 252.
review on certificate of division of opinion of circuit courts, 252.
the specific point of law must be stated, 253.
the question must be one of law and not of discretion, 254.
certificate of division of opinion in criminal cases, 254.
procedure where the judges are divided in opinion on a question certified to the Supreme Court, 255.
appeals in prize causes, 255.
time allowed for appeal, 256.
appeals cannot be taken in name of steamboat, 257.
writs of error or appeal in certain cases without regard to the amount, 257.
cases not embraced in the statute, 258.
cases tried without a jury, 259.
general and special findings, 259.
writs of error upon agreed case, ~~560~~. 260
writs of error and appeals from other courts, 561. 261
appeals from the Court of Claims, 562. 262
judgments and decrees of state courts, 562. 262
writs of error to state courts, 564. 264
a proper question must be presented by the record, 565.
a specific question must be presented, 565.
United States a right to the writ, 567.
highest court of a state, what is, 567.
what the record must contain, 568.
constitutionality of state laws, 569.
review on error in criminal cases, 570.
transcripts and papers on appeal, 570.
rules relating to transcripts and papers, 273.
writs of error, when returnable, 273.
bond for costs, 273.
appearance of counsel for plaintiff in error or appellant to be entered, 274.
procedure after appearance, 274.
on failure to appear, 274.
docketing cases; filing transcript, 274.
duty of clerk to have copies of record printed, 276.
motion day—Monday of each week, 276.
motions to dismiss on notice, 276.
motion to dismiss and affirm, 277.
mode of service of notice and proof, 277.
procedure in case of diminution of record, 278.
writ of certiorari may issue to bring up record, 278.
procedure where either party dockets the case, 278.
priority of state on the docket where it is a party, 279.
submission of causes on printed arguments, 280.
call of the docket, 280.
preparation of argument, and procedure on, 281.
what the brief must contain, 282.
judgment on review, 283.
where there are errors apparent of record, 284.
interest, damages, 285.
will not be reversed for technical errors, 285.
when a new trial will be awarded, 285.
when a cause will be remanded for amendments, 286.
the court cannot execute its judgments on review, but will send a mandate to the inferior court, 287.
mandate conclusive upon the inferior court, 287.
may be revoked, 287.
costs on affirmance, reversal, dismissal, 288.
opinions must be recorded, 289.
when a rehearing will be granted, 289.

WRIT OF ERROR AND APPEAL—*continued.*
adjournments must be announced ten days before the time, 290.
dismissal of, in vacation, 290.
duty of clerk in such cases, 290.
Court of Claims, record on appeals from, 291.
rule in reference to the record strictly observed, 291.
petition for allowance of an appeal from, 291.
order of allowance of an appeal, 291.
ninety days allowed for application, 291.
proceedings in case of diminution of record, 292.
duty of the court to make and file findings of fact and conclusions of law, 292.

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